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84-1632

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD W. SUTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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3 COPIES

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals erred by refusing to consolidate this appeal with two related appeals; because, with the simultaneous pendency of more than six civil and criminal cases against Petitioner, such multiplicity of litigation being all related to the operation of his National Investment Publishing Company, subjected Petitioner to Double Jeopardy, Selective Prosecution, and Discriminatory Enforcement for his Political Activities through Freedom of the Press and of Speech.

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In The

Supreme Court of the United States

October Term, 1984

RICHARD W. SUTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

Defendant Richard W. Suter was convicted in the United States District Court for the Northern District of Illinois of mail fraud and was sentenced to a term of imprisonment of one year, followed by five years probation, conditioned upon, among other things, his payment of restitution in the amount of $67,800. The Seventh Circuit Court of Appeals affirmed. Defendant filed a Petition for a Rehearing, which was denied on February 14, 1985.

JURISDICTION

The United States Supreme Court has jurisdiction under United States Supreme Court Rule 21 and related federal statutory and constitutional provisions. The Writ of Certiorari ought to be granted, because constitutional issues of Selective Prosecution for Political Free Speech and Press have occurred because the trial court refused a hearing on selective prosecution, and the Court of Appeals refused to consolidate this appeal with two related appeals, to which the Prosecutor had made reference at the sentencing hearing. This Petition for Writ of Certiorari was filed within sixty days of the denial of the Petition for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 10, 1982, Richard W. Suter was charged in a 23-count indictment alleging mail fraud. 18 U.S.C. § 1341. In essence, the indictment charged that Suter had engaged in a fraudulent scheme to obtain monies through the mails from individuals wishing to acquire rare coins. Through advertisements which ran in a newsletter he published, Suter offered his services as a broker, stating that upon receipt of a pre-paid order, he would purchase coins and ship them to the customer. However, in many instances, Suter would either fail to provide coins or refunds to customers, sending them letters containing false

representations as to why their orders had not been filled, or refunds returned, in order to retain their money. Pursuant to a written plea agreement entered into with the government, Suter agreed to plead guilty to Counts 3 and 15 of the indictment in return for the government's promise to dismiss the remaining counts and make no recommendation to the court concerning what sentence or fine to impose. Following a lengthy hearing held on June 24, 1983, the court accepted Suter's plea and entered a finding of guilt and judgment of conviction as to Counts 3 and 15. Several months later, following extensive plea negotiations between Suter and the government, Suter agreed to make restitution in the amount of $67,830.34 to the victims of his coin brokerage scheme. However, one week before his scheduled sentencing on January 24, 1984, Suter filed a motion to withdraw his guilty plea. The government in response opposed the motion, and on January 24, 1984, after a hearing, the district court denied Suter leave to withdraw his plea, sentenced him to one year imprisonment on Count 3 and suspended imposition of sentence on Count 15, placing him on probation for a period of 5 years to run consecutively with the sentence in Count 3. As special conditions of probation, Suter was ordered to make restitution in the amount of $67,800 and not deal in coins. Suter appealed to the Seventh Circuit Court of Appeals, but they affirmed the conviction. He seeks a Writ of Certiorari from this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED BY REFUSING TO CONSOLIDATE THIS APPEAL WITH TWO RELATED APPEALS INVOLVING THE SAME DEFENDANT; BECAUSE, WITH THE SIMULTANEOUS PENDENCY OF MORE THAN SIX CIVIL AND CRIMINAL CASES AGAINST PETITIONER, SUCH MULTIPLICITY OF LITIGATION BEING ALL RELATED TO THE OPERATION OF HIS NATIONAL INVESTMENT PUBLISHING COMPANY, WOULD SHOW THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY, SELECTIVE PROSECUTION, AND DISCRIMINATORY ENFORCEMENT FOR HIS POLITICAL ACTIVITIES THROUGH FREEDOM OF THE PRESS AND OF SPEECH.

The Supreme Court is requested to make an examination of the correctness of the district court's denial of Suter's motion for leave to withdraw his plea. (See App. 66).

If the Supreme Court would allow Petitioner to consolidate the instant case with the 7th Circuit Appeal Number 84-1516, *McCullough v. Suter*, "The question for decision—one of first impression so far as we are able to determine—is whether a sole proprietorship can be an 'enterprise' with which its proprietor can be 'associated' ", decided March 13, 1985; and consolidate those two with the appeal which the Seventh Circuit is holding in abeyance pending the Supreme Court's decision in a virtually identical case, *S.E.C. v. Lowe*, (83-1911), then, Petitioner believes, it would become apparent that the Court of Appeals erred in not allowing a consolidation in their court. Such a consolidation would show that the multiplicity of litigation was itself an indication of the alleged Selective Prosecution for Political Activities, contrary to his constitutional rights of Freedom of Speech and of the Press. He would hope to be able to show either—

(1) Selective Prosecution and Discriminatory Enforcement for his political activities,

(2) Double Jeopardy by being charged with the same offense in both the instant case where R.I.C.O. was not alleged and in a civil case based on the same facts but with a R.I.C.O. finding with treble damages, or

(3) that, although he did "knowingly" plead guilty, he had not done so "understandingly" as to the consequences including that he would be less likely to be able to make $67,000 worth of restitution to the 23 victims as a condition of the 5-year probation period after his one-year prison sentence, as a direct result of the treble damage judgment on behalf of one of the victims in a civil case where there is a judgment of about 3 X $14,000 = $42,000. If as a result of that "Double Jeopardy" he does not fulfill said condition of probation, he could face an additional five years in prison. He had had no understanding whatsoever of such possible consequence, when he had pled guilty.

Petitioner agrees with that portion of the Opinion which reads:

> "Rule 32(d) of the Federal Rules of Criminal Procedure permits a defendant to withdraw a plea of guilty before sentence is imposed upon a showing to the court of 'any fair and just reason.' Whether the request will be granted or denied, however, ' "is within the sound discretion of the trial court and will not be reversed except upon an abuse of that discretion." ' *United States v. Thompson*, 680 F.2d 1145, 1151 (7th Cir.), *cert. denied*, 459 U.S. 1089 (1982), quoting, *United States v. Wright*, 407 F.2d 952, 954 (7th Cir. 1969). The trial court's findings on this issue will be upheld unless 'clearly erroneous.' *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977); *United States v. Fellus*, 573 F. Supp. 615, 618 (S.D. N.Y. 1983)." (App. 4)

He strongly disagrees, however, with the reasoning shortly thereafter, which reads:

> "the government has neither said or done anything which would constitute a sentence recommendation in breach of its plea agreement with Suter to make no recommendation; and Suter's present motion to withdraw his plea is obviously motivated by the civil consequences in the form of treble damages in related civil litigation." (App. 4)
>
> "Unconvinced by Suter's renewed claim of innocence, the district court at the plea withdrawal hearing determined that Suter was motivated in his request by collateral civil consequences to the plea, a reason insufficient, in the district court's opinion, to justify withdrawal of the plea: * * *" (App. 5-6)
>
> "We find the district court properly exercised its discretion in the denial of Suter's motion to withdraw his plea. Failing to advance a 'fair and just reason' for withdrawal of his plea, Suter was not entitled to an evidentiary hearing on the motion. *United States v. Thompson*, 680 F.2d at 1152." (App. 6)

On page 7 of the Opinion the Seventh Circuit continued:

> "Suter claims the district court abused its discretion in denying an evidentiary hearing on his motion to dismiss the indictment for selective prosecution. This court need not reach this issue, however, since Suter failed to preserve the issue for appellate review by not complying with the requirements of entering a 'conditional plea.' Fed. R. Crim. P. 11(a)(2). In his reply brief, Suter asserts for the first time a claim of double jeopardy. Issues raised for the first time in a reply brief are normally not considered on appeal. *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976), citing *Finsky v. Union Carbide & Carbon Corp.*, 249 F.2d 449, 459 (7th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958). In any event, Suter has not been placed in jeopardy twice merely because he faces judgments or penalties in civil

> lawsuits or administrative actions based on the same fraudulent scheme for which he stands convicted in federal district court. *See, e.g., United States v. Hall*, 559 F.2d 1160, 1163 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *United States v. Barger*, 458 F.2d 396 (9th Cir. 1972) (per curiam); *United States v. Countryside Farms, Inc.*, 428 F. Supp. 1150, 1159 (D. Utah 1977)." (App. 7)

Probably the simplest and clearest way to express Petitioner Richard Suter's view of the issues is to direct this Court's attention to the footnote in the Seventh Circuit's Opinion, at page 5, footnote 3:

> "The transcript of the October 21 hearing demonstrates that on more than one occasion the prosecutor, in addressing the district court, prefaced her comments by explicitly stating that she was not making a recommendation as to what sentence the court should impose, and that her remarks should not be interpreted as such." (App. 5)

Why did she find it necessary to make such a statement "on more than one occasion"? Defendant is convinced that she was indeed making recommendations, which she knew the Plea Agreement forbade. It is like saying this cow is a horse because it has more than one sign saying it is.

By the Prosecutor's having implied to the Court at the sentencing hearing that Defendant had been prohibited from publishing newsletters, which was untrue, she gave the Court the erroneous view that incarceration of defendant would have no significantly adverse effect on the more than 4,000 subscribers to defendant's newsletters who each paid more than $100 a year to receive same. The fact is that such newsletters are written and edited solely by this sole-proprietor defendant, and any incarceration will directly prejudice the rights of paid subscribers to receive the material for which they paid.

An important example of the necessity for this appeal to be consolidated with the two related appeals, which were made issues in the Appellee's Brief, is the subject of the R.I.C.O. treble damage awarded in the *McCullough* civil case before Judge Parsons. In the Government's List Of Authorities and the text of its Appellee's Brief, it lists and comments and relies upon—

> "McCullough v. Suter, No. 82 C 6115 (N.D.Ill) *appeal pending*, No. 84-1516 (7th Cir.) 14
>
> "SEC v. Suter, 732 F.2d 1294 (7th Cir. 1984) .. 11
>
> "Suter v. SEC, No. 83-3011 (7th Cir. filed Nov. 16, 1983) ..... 11."

On page 11 of appellee's brief is stated, *inter alia*,

> "The written plea agreement provided that 'at the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose' (A35), but the government would 'fully apprise the district court . . . of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters . . .' . . . . After the guilty plea was accepted, the district judge inquired about possible restitution to the defendant's victims. . . .
>
> . . . The prosecutor then advised the court that defendant's registration with the Securities and Exchange Commission (SEC) as an investment advisor had just been revoked, which cast doubt on defendant's future earnings and, thus, his ability to make full restitution."

On October 21, 1983, the defendant appeared for sentencing, but the sentencing was continued until January 24, 1984.

His plea was entered in reliance upon the government's promise that

"12. At the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose." (App. 37)

Since defendant believed and relied upon that promise, he was surprised when the Assistant United States Attorney advised the Court that—

"MS. FABRI: Your Honor, I believe that the most serious question that we have to address today, now that we have some resolution as to the amount [of proposed restitution], is the manner in which Mr. Suter can reasonably be expected to make this restitution.

I don't know if the Court is aware of an order entered by the Securities & Exchange Commission earlier this week. That order, as I understand it, your Honor—and I will just read the last sentence—

MR. ARNETT: This week?

MS. FABRI: Could have been last week. I am not certain, Mr. Arnett. I received a copy of it this week.

'Under all the circumstances, we are convinced that the public interest requires the revocation of Suter's investment advisor registration and his bar from association with any investment advisor.'

* * *

. . . So that if this administrative decision does go into force and effect . . . the result of it would be that Mr. Suter cannot publish his newsletter. . . .

Judge, I think a very serious question is presented to the court as to how Mr. Suter can reasonably be expected to make restitution. . . ." (TR 6)

Assistant U. S. Attorney Fabri knew or should have known that she was incorrectly stating the law inasmuch as Mr. Suter has a right to publish his financial newsletter without being a registered investment advisor, both

under the exemption of 15 U.S.C. 80b-2(a)(11)(D) and under the First Amendment Freedom of the Press. It appears that she was violating the Plea Agreement not to make any recommendation about sentencing by suggesting to the Court that there allegedly was "a very serious question . . . as to how Mr. Suter can reasonably be expected to make restitution." The inescapable inference is that, since he can't make restitution because he allegedly would be unable to continue publication, according to her, it was being implicitly recommended that he should be sentenced to incarceration rather than probation.

She went on to argue, "I recognize that you are considering a sentence of probation and, of course, pursuant to the plea agreement, *I can make no recommendation,* **but** I submit, your Honor, you have a great deal of flexibility built into the system." (TR 7) Then the Government apparently further violated its promise not to make recommendation for some sentence more severe than probation, by stating, 1984, Orwellian style:

> "I would urge you, Judge, *although I am not* requesting or *recommending a sentence of incarceration*—pursuant to our plea agreement, *I cannot do that,* and I understand that *the Court is inclined to give a sentence of probation* if Mr. Suter were to agree to make restitution; *but, Judge,* if you impose a sentence of probation for two or three years, Mr. Suter may not be able to make this money in two or three years. The government and *all of these victims are without recourse if a period of probation is imposed* until the last day of that probationary period. That would be the time that Mr. Suter is deemed to have violated his probation." (App. 53; emphasis added)
>
> "—and again, I have to underscore I am not recommending this." (App. 53)

For the prosecutor to state that "victims are without recourse if a period of probation is imposed" is but another way of recommending prison, in violation of the contractual agreement for the government to make no recommendation at sentencing. By such arguments, the Government has, defendant believes, so breached the term of the plea agreement to "make no recommendation to the judge concerning what sentence or fine to impose" that he should, on that ground alone, be entitled to have the plea vacated and the indictment dismissed.

On page 14 of the government's brief is stated:

> "Turning away from defendant's obligation to show a fair and just reason and the additional question of prejudice to the government, the district judge believed the consequential effect of the guilty plea on civil litigation pending against the defendant 'does appear to be something which motivates his present motion to withdraw his plea.' 1-24-84 Tr. 4. The district court's view is borne out by a pleading defendant filed in certain civil litigation, *McCullough v. Suter*, No. 82 C 6115 (N.D.Ill.), now before this Court on defendant's appeal, docket No. 84-1516. . . ."

Since the Trial Court in this case failed and neglected to suggest that the restitution being sought in the McCullough related civil case would duplicate the restitution being awarded here, and since the Court also failed to make reference to the possibility of treble damages in the civil case, Defendant was thereby not adequately instructed as to the consequences of his guilty plea. Conversely, since Judge Parsons awarded treble damages under the Racketeering Act in the civil case whereas there had been no Racketeering charge in the indictment in this criminal case, there was not only a lack of adequate warning and questioning by Judge Grady before accepting the guilty plea; but it is also a clear illustration

of the need to consolidate this case with two pending appeals in the Seventh Circuit, *McCullough v. Suter*, No. 84-1516 and *Suter v. SEC*, No. 83-3011, so that Petitioner can adequately give this Court the full, overall picture which appears to him to be proof of the selective and vindictive prosecution being waged against him simultaneously through the U. S. Attorney's office, the S.E.C. administrative proceedings, the other SEC civil district court proceedings, the McCullough civil case and similar cases in the State court. Thus, the extreme prejudice against defendant, by having to defend the cases separately in multiple litigation far outweighs any possible prejudice against the government if the guilty plea would have been vacated.

The government's case of *United States v. Block*, 660 F.2d 1086 (5th Cir. 1981) is as applicable to the defendant's view of the case as to theirs. "A number of cases have concluded that an agreement not to take a position on the sentence or an agreement to stand mute at the sentence hearing prohibits the Government from attempting to influence the sentencing judge." (p. 1090) Yet, although that was the agreement in this case, the government made false and misleading statements with regard to defendant's investment advisor's registration, to wit, "defendant's registration with the Securities and Exchange Commission as an investment advisor had just been revoked, which cast doubt on defendant's future earnings, and thus, his ability to make full restitution." The prosecutor should have known that the facts were that defendant's principal income is from publishing newsletters, and in fact that none of defendant's income came from "investment advisor" activities. The prosecutor being a trained lawyer, she should have realized that the First Amendment to the Constitution of the United States guarantees the defendant the absolute right to publish any

truthful material, without any government license whatever. Further, the fact of the matter is that defendant is publishing exactly the same newsletter today that he had been publishing before the SEC action. The SEC ruling did not direct him to stop publishing the newsletter, only to refrain from publishing any inaccurate facts in his subscription solicitations.

Responding to the government's argument about Rule 11, where appellee discusses subsections (a)(2), (c)(1), and (f), the United States Supreme Court expresses defendant's viewpoint:

> "We agree with petitioner that the District Judge did not comply with Rule 11 in this case: and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal. . . .
>
> "To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to 'assumptions' not based upon recorded responses to his inquiries."

McCarthy v. United States, 394 U.S. 459, 467 (1968).

It seems evident that Judge Grady relied upon an assumption that defendant would lose income as a result of the SEC revocation of his investment advisor status,

since the prosecutor had falsely implied (TR 6) that this would prevent him from continuing to publish his newsletter. In the words of the *McCarthy* case, when "the district court resorts to 'assumptions' not based upon [truthful] recorded responses to his inquiries", then these Rule 11 goals are undermined.

The government's reference to two related Suter cases raises the issue of multiple punishments as well as the original issue of selective and vindictive prosecutions. The Fifth Amendment protects against multiple prosecutions; *North Carolina v. Pearce,* 395 U.S. 711 (1969) made that clear:

> "The Court has held today, in *Benton v. Maryland, post,* p. 784, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections.[8] It protects against a second prosecution for the same offense after acquittal.[9] It protects against a second prosecution for the same offense after conviction.[10] And it protects against multiple punishments for the same offense.[11] This last protection is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte Lange,* 18 Wall. 163, 168." (pp. 717-718) (footnotes omitted).

This Court is respectfully requested to find that the entry of treble damages under RICO, a Title 18 statute, in the related civil McCullough case quoted in appellee's brief, constitutes being twice punished, unconstitutionally. The inquiry, then, is into the meaning of "double" or "multiple" punishment. The Supreme Court held in *North Carolina v. Pearce, supra,* page 730:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence. *Id.*, at 168."

The punishment of RICO treble damages imposed by Judge Parsons in a related civil case, in addition to the restitution imposed by Judge Grady in this case, is "to bring the party within the jurisdiction of more than one court".

The Government relied in its brief upon, among other cases, *United States v. Gaertner*, 583 F.2d 308 (7th Cir. 1978) where the constitutionality of the plea bargaining process was questioned: "It does not appear that Gaertner raised this claim . . . before the district court, and he has not made any serious attempt to advance an argument in support of his claim in this court". In the instant case, Suter is challenging the constitutionality of selectively prosecuting him because of his political activities.

Certainly his Motion to Dismiss for Selective Prosecution is allowed for within the pretrial motion scheme, by Rule 12(e). The court may defer decision if production of evidence will clarify the issue; so the Court erred in not allowing production of evidence of the constitutional objection.

Counsel for petitioner is well aware that the two sides in a case can view a given set of facts in two different

lights. For example, the government had quoted and referred to one of the cases of the *Securities and Exchange Commission v. Richard W. Suter*, 732 F.2d 1294 (7th Cir. 1984) as though it helps their view of the case. From Suter's viewpoint, however, the existence of this series of cases in which he is defendant—the above S.E.C. case, another S.E.C. case "*Suter v. SEC*, No. 83-3011 (7th Cir. filed Nov. 16, 1983)" and "*McCullough v. Suter*, No. 82 C 6115 (N.D. Ill.) appeal No. 84-1516 (7th Cir.)"—all listed in the United States' brief—are proof positive that he is being selectively prosecuted for his political activities, as he would have been more able to show if the Court had allowed him an evidentiary hearing on the subject.

Petitioner Suter's Motion to Dismiss the Indictment for Selective Prosecution . . . for his Political Activities (App. 19) together with the supporting affidavit are the crux of this petition. The supporting Affidavit together with the Exhibits were not meant, in and of themselves, to constitute adequate evidence upon which the Court could have determined whether there was sufficient violation of defendants rights to form the basis for dismissing the indictment. Rather, they were the basis for requiring the Court, in its discretion, to have granted a full evidentiary hearing on the issue of the alleged Selective Prosecution, for political activities.

This Court's attention is directed to the Affidavit, pages 6 and 7 of the Motion to Dismiss where it states:

> "I was Illinois Chairman of the Libertarian Party in 1976. My activities were and still are directed toward reduction in taxes and in governmental activity generally . . . . We were involved in the formation of a new political party, the Taxpayers Party . . . ." (App. 24)

> "4. In 1980, an individual with similar political beliefs was passing out political handbills . . . . A young woman took one . . . and . . . she inquired whether this was the organization that Richard Suter was associated with. . . .(S)he told him that her name was Barbara and that she worked for the S.E.C. Shortly thereafter, the Securities and Exchange Commission began an administrative proceeding against me and my company, the National Investment Publishing Company . . . . Simultaneously it filed a related civil action now pending . . . ." (App. 26)

This Court should weigh carefully two constitutional principles and rights; they are the exercise of the discretionary powers of the United States Attorneys over criminal prosecutions versus the defendant's First Amendment rights of Freedom of Speech and Assembly, to petition the government for a Redress of Grievances. His political activities, through the process of petitioning for such redress from excessively high taxes, have been exactly the exercise of such rights, directed to assisting and educating other citizens similarly concerned with high taxes resulting from unnecessary growth of government at various levels.

The principle that we have no political prisoners in these United States is so ingrained in our thinking about our constitutional scheme of government, that there appears to be virtually no listing in the various legal indices under Political; and even a heading of Selective Prosecution or Discriminatory Enforcement is few and far between. This may well be a case of first impression as to whether the "doctrine of separation of powers" allows the district court to overrule the discretion of the prosecutor as the only means of protecting this kind of defendant from being deprived of his aforesaid constitutional rights by a selective prosecution.

This selective prosecution for political activities is not only encroaching upon Richard Suter's Rights of Freedom and Speech, Assembly, and Petitioning for Redress of Grievances; but it is also encroaching upon his right to Freedom of the Press inasmuch as his finanical newsletters of regular and general circulation regularly have espoused his conservative political views.

"In our tripartite system of government, the three branches are co-equal, and *the Constitution is superior to each* branch. The supremacy of the Constitution, the supremacy of the 'consent of the governed,' requires that each branch adhere to constitutional principles in the exercise of its powers.

> "Ideally, constitutionally, the judiciary measures the other branches' adherence to constitutional principles only secondarily, after the primary measure of adherence has been taken by the co-equal branch itself. Thus, the prosecutor's decision to prosecute must always be made with constitutional limits on discretion in mind. Then, the judiciary performs the very limited role of secondarily measuring the primary decision of the prosecutor against constitutional standards. . . . Mr. Chief Justice Burger, writing for a unanimous court, encapsulated this basic aspect of our Tripartite government, in *United States v. Nixon*, 418 U.S. 683, 703 . . . (1974):
>
> > 'In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *United States v. Johnson*, 577 F.2d 1304, 1307-8 (5th Cir., 1978; emphasis added).' "

"Nearly a century ago, the Supreme Court concluded that the administration of laws 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances' constituted a denial of equal protection of the laws. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 . . . (1886). . . . This admonition is applicable to the federal government through the equal protection component of the Fifth Amendment due process clause. . . .

"A test for deciding when a decision to prosecute unconstitutionally denies equal protection of the laws was set forth by the United States Court of Appeals for the Second Circuit in *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974):

> 'To support a defense of selective or disc[r]iminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*,
>
> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
>
> (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights.'
>
> These two essential elements are sometimes referred to as 'intentional and purposeful discrimination'." *Id.* at 1308.

A majority of the United States Court of Appeals have recognized the "test for deciding when a decision to prosecute unconstitutionally denies equal protection", according to the *Johnson* case, supra, including the two elements of intentional and purposeful discrimination.

The situation here is more complicated than the *Johnson* case, however; because there the simple answer was that "the conduct for which he was prosecuted is not ordinarily ignored." In the instant Suter case, whether the use of the mails in a way that 23 customers apparently complained to the authorities is conduct ordinarily prosecuted is just part of the question. The overall circumstances include whether a person who is engaged in the conduct of publishing newsletters, including for a time a newsletter about investing in coins, is ordinarily simultaneously prosecuted in a criminal case, a case by the SEC, an administrative case by the SEC, and various civil cases by some of the complainants in the criminal case. This is what constitutes the unconstitutional discriminatory prosecution for his political activities.

In *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974) the Court reasoned:

> "In his opinion Judge Judd held that Berrios' allegations warranted a hearing on the selective prosecution issue and that Berrios' 'offer of proof' was sufficient to create a prima facie case of selective prosecution" (pp. 1210-11).

The Court of Appeals in remanding the case for further proceedings ruled,

> "Notwithstanding the apparent weakness of Berrios' claim [of selective prosecution], we recognize that the decision to permit a hearing and, in anticipation thereof, to authorize a subpoena of evidence in the government's possession, lies largely in the trial judge's discretion" (p. 1212).

This Court should consider the reasoning in *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973):

> "Certainly, the prospect of government prosecutors being called to the stand by every criminal defendant for cross-examination as to their motives in seeking

an indictment is to be avoided. That does not mean that a criminal defendant is never to be afforded an opportunity to prove that the prosecution stems from an improper prosecutorial design or that he may never question a prosecutor under oath. The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised. . . .

"The particular circumstances of this case which we believe compelled the government to accept the burden of proving nondiscriminatory enforcement of the law are several. . . .

> *'[A]n enforcement procedure that focuses upon the vocal offender is inherently suspect,* since it is vulnerable to the charge that *those chosen for prosecution are being punished for their expression of ideas,* a constitutionally protected right.'

In the present case there are several indications that this was exactly the purpose of the prosecution." (p. 621; emphasis added)

"An individual's right to equal protection, it has been held as a general principle, may be violated by discriminatory administration of a law that is impartial on its face. It has been indicated that this principle is properly applicable to enforcement of the criminal law and that a violation may be established where the accused is able to show that other individuals similarly situated have not generally been prosecuted, that the alleged discrimination in the circumstances presented was intentional or purposeful, and that the selection of the accused for prosecution was based on an arbitrary or invidious classification", 21A Am.Jur.2d 281.

"Oaks contends that he was selected for prosecution solely because he protested publicly against federal tax policies. While we express no opinion on this issue, the law in the circuit requires the district court, upon a proper offer of proof, to allow Oaks to present evidence, if any, that he has been singled out for discriminatory prosecutions." *United States v. Oaks*, 508 F.2d 1403 (1974, 9th Cir.)

"(A) policy of selective prosecution which purposefully discriminates against persons choosing to exercise their First Amendment rights is impermissible. . . . Hearings on similar pretrial objections are usually in order when enough facts are alleged to take the question past the frivolous stage. . . . We hold that Oaks has alleged enough facts to require an evidentiary hearing. . . . If the district court finds that there was impermissible discrimination, it should dismiss the indictment. (pp. 1404-5)" *Id.*

"That a claim of discriminatory enforcement may be raised as a defense to a criminal charge is clear in New York law." *Hendricks, et al. v. Hogan, et al.*, 324 F.Supp. 1277, 1282 (1971).

It is beyond question that freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty protected from governmental intrusion by the First and Fourteenth Amendments. Moreover, privacy in that association—particularly with respect to groups championing unpopular causes—is a vital incident of the primary right. Indeed, inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

Relevant portions of the Plea Agreement (App. 32) include these. Defendant owns and operates "the National Investment Publishing Company. . . . During the years

1976 through 1981 he offered through the newsletter to obtain coins on behalf of collectors or investors in return for a fee or commission on each sale." [par. 6.(1)]

> "In connection therewith defendant solicited and received money from various collectors and investors which money had been sent for the purpose of defendant obtaining coins either on a discretionary basis or specific request basis.
>
> * * *
>
> "12. At the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose. . . .
>
> "15. . . . the government will move to dismiss the remaining counts of the indictment."

At apparently the same time when Rule 32, F.R.Cr.P., was amended to add "upon a showing by the defendant of any fair and just reason", Rule 32.1 was also added, all of which are so new that they remain in the Pocket Parts of *United States Code Annotated*, "For Use In 1984". The latter rule includes, "A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him." By analogy, since the prospect of Defendant Suter's serving time in a penitentiary is a certainty, "unless the relief granted" through this appeal "upon his request or the court's own motion is favorable to him",—and this is more serious and far less "favorable to him" than would be probation—"A hearing and assistance of counsel are required" by the general principles of Due Process, before the Court determines, under amended Rule 32(d), whether Defendant can be deemed to have had adequate opportunity to sustain his burden of proving that he has "any fair and just reason" for be-

ing allowed to withdraw his guilty plea before sentencing. The amended rules being quoted above read as follows:

> Rule 32(d). "If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. . . ."
>
> Rule 32.1(b). "A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him."

As stated in Rule 32(d),

> "If a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed . . ., *the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.*"

The emphasized clause was added, apparently in 1983; and it was intended to clarify the standard applicable to plea withdrawal under this rule. Although this amended section 32(d) is at best a minor one in terms of how post-sentence motions to withdraw pleas will be decided, the "fair and just" standard requires that the defendant have the burden of showing a "fair and just" reason for withdrawal of the plea. Unless a defendant seeking a withdrawal is granted a full and fair hearing, however, as Defendant Suter was not, he has been denied the opportunity which Due Process would require for a litigant to have a chance to uphold the burden of proof imposed upon him by this amended rule.

SUMMARY AND CONCLUSION

It is therefore respectfully suggested that the United States Supreme Court find that the Seventh Circuit Court of Appeals erred in not consolidating three related appeals where Petitioner was Defendant. It is respectfully requested that a Writ of Certiorari issue to the Seventh Circuit so that this Court can determine whether, had such consolidation occurred, the Petitioner has been deprived of constitutional rights of Freedom of Speech and of the Press, and of the right against Double Jeopardy and Selective Prosecution for Political Activities.

It is further requested that this Court stay all proceedings in this matter pending the appeal in *McCullough v. Suter*, No. 84-1516, decided by the Seventh Circuit on March 13, 1985; and stay proceedings until the Supreme Court reaches its decision in the pending *S.E.C. v. Christopher Lowe* case, No. 83-1911, so that Petitioner may also appeal his pending case, *S.E.C. v. Richard W. Suter*, No. 83-3011, presently stayed by the Seventh Circuit awaiting the decision in the *Lowe* case. Then the aforesaid three Suter cases, Nos. 83-3011, 84-1516, and 84-1198 (the instant case) could all be consolidated in the Supreme Court of the United States to determine whether such multiplicity of litigation constitutes unconstitutional selective prosecution or multiple jeopardy.

Respectfully submitted,

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84-1632

No.

Office - Supreme Court, U.S.
FILED
APR 15 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD W. SUTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD W. SUTER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1198

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD W. SUTER,

Defendant-Appellant.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 563—John F. Grady, *Judge.*

ARGUED NOVEMBER 20, 1984—DECIDED JANUARY 17, 1985

Before BAUER, WOOD and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* Defendant Richard W. Suter was convicted in the United States District Court for the Northern District of Illinois of mail fraud and was sentenced to a term of imprisonment of one year, followed by five years probation, conditioned upon, among other things, his payment of restitution in the amount of $67,800. Suter appeals. We affirm the district court's judgment of conviction and sentence.

On August 10, 1982, Richard W. Suter was charged in a 23-count indictment alleging mail fraud. 18 U.S.C. § 1341.

In essence, the indictment charged that Suter had engaged in a fraudulent scheme to obtain monies through the mails from individuals wishing to acquire rare coins. Through advertisements which ran in a newsletter he published, Suter offered his services as a broker, stating that upon receipt of a pre-paid order, he would purchase coins and ship them to the customer. However, in many instances, Suter would either fail to provide coins or refunds to customers, sending them letters containing false representations as to why their orders had not been filled, or refunds returned, in order to retain their money. Pursuant to a written plea agreement entered into with the government, Suter agreed to plead guilty to Counts 3 and 15 of the indictment in return for the government's promise to dismiss the remaining counts and make no recommendation to the court concerning what sentence or fine to impose. Following a lengthy hearing held on June 24, 1983, the court accepted Suter's plea and entered a finding of guilt and judgment of conviction as to Counts 3 and 15. Several months later, following extensive plea negotiations between Suter and the government, Suter agreed to make restitution in the amount of $67,830.34 to the victims of his coin brokerage scheme. However, one week before his scheduled sentencing on January 24, 1984, Suter filed a motion to withdraw his guilty plea. The government in response opposed the motion, and on January 24, 1984, after a hearing, the district court denied Suter leave to withdraw his plea, sentenced him to one year imprisonment on Count 3 and suspended imposition of sentence on Count 15, placing him on probation for a period of 5 years to run consecutively with the sentence in Count 3. As special conditions of probation, Suter was ordered to make restitution in the amount of $67,800 and not deal in coins. Suter appeals from his sentence and conviction.

Suter charges that the district court, in accepting his plea of guilty, failed to comply with the requirements of Fed. R. Crim. P. 11 in three aspects. Suter contends the record does not demonstrate that he understood the

nature of the charges against him, that he was adequately instructed as to the consequences of his plea, and that a factual basis for the plea was established. On a direct appeal of a conviction arising from a guilty plea, any noncompliance with Rule 11 requires reversal. *United States v. Frazier*, 705 F.2d 903, 907 (7th Cir. 1983) (per curiam). Suter's bald assertions to the contrary notwithstanding, the record of the plea hearing amply demonstrates that Suter understood the nature of the charges he faced and that a factual basis existed for his plea. Suter was represented by counsel and impressed the court as "a person of superior understanding and intelligence." The written plea agreement, which Suter acknowledged he had read and signed, set out in great detail the overall scheme to defraud, involving use of the mail, and the particular facts of Counts 3 and 15 of the indictment. Moreover, both Counts 3 and 15 were meticulously described, explained and admitted to by Suter during his plea hearing. The letters which gave rise to Counts 3 and 15 were produced. After examining them, Suter acknowledged having authorized both their drafting and mailing, and admitted to the court that "there was a scheme to defraud people by taking their money and not delivering coins or refunds." Expressing surprise that his mail fraud conviction led to the imposition of treble damages in a related civil action, Suter also contends the district court failed to adequately inform him of the consequences of his guilty plea. Suter misconstrues Rule 11. A defendant is entitled to be informed of the direct, not all the collateral, consequences of his plea. *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984). Compliance with this rule requires the sentencing court to explain to the defendant the definite, immediate and automatic consequences of his plea, *id.* at 110, and does not require a defendant be advised of the range of civil penalties or judgments he may face as a consequence of his plea. Holding that Suter's attack on the validity of his plea to be without merit, we turn to an examination of the correctness of the district court's denial of Suter's motion for leave to withdraw his plea.

Rule 32(d) of the Federal Rules of Criminal Procedure permits a defendant to withdraw a plea of guilty before sentence is imposed upon a showing to the court of "any fair and just reason." Whether the request will be granted or denied, however, " 'is within the sound discretion of the trial court and will not be reversed except upon an abuse of that discretion.' " *United States v. Thompson*, 680 F.2d 1145, 1151 (7th Cir.), *cert. denied*, 459 U.S. 1089 (1982), quoting, *United States v. Wright*, 407 F.2d 952, 954 (7th Cir. 1969). The trial court's findings on this issue will be upheld unless "clearly erroneous." *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977); *United States v. Fellus*, 573 F. Supp. 615, 618 (S.D. N.Y. 1983). In concluding that Suter had failed to present any reason which would allow the withdrawal of his plea, the district court made the following findings, each of which we hold not to be clearly erroneous: a great deal of precious court time was spent on Suter's plea; it was entered by Suter with full knowledge of the facts, with fair warning of the consequences, and with exhaustive reflection on the part of Suter and his counsel; the government has neither said or done anything which would constitute a sentence recommendation in breach of its plea agreement with Suter to make no recommendation; and Suter's present motion to withdraw his plea is obviously motivated by the civil consequences in the form of treble damages in related civil litigation. After apprising the court, during the course of a hearing held on October 21, 1983, of relevant factual information it possessed as to Suter's financial and business affairs and its potential impact on the restitution rights of the individuals Suter defrauded,[1] the government prosecutor went on to point out various sentencing alternatives the court could impose in protecting the victims.

---

[1] As part of its plea agreement with Suter, the government explicitly reserved the right to "fully apprise the District Court . . . of the nature, scope and extent of [Suter's] conduct regarding the charges against him, and related matters, including all matters in aggravation and mitigation relevant to the issue of sentencing."

In doing so, however, the government expressed no position as to what sentence should be imposed. Rather, the government's comments were motivated by its responsibility[2] to the victims of Suter's fraudulent scheme. Consistent with this responsibility and in fulfillment of its promises under the plea agreement, the prosecutor properly limited[3] her statements to an exploration of the range of sentencing options available to the court which would enhance Suter's payment of restitution. We find the comments were an adjunct to, and in compliance with, the court's request for the parties to work out an agreement on restitution, and not tantamount, as Suter contends, to a sentence recommendation by the government. Given the great care with which Suter's plea was accepted, in addition to the lapse of almost seven months from the time the plea was entered to his motion for withdrawal, Suter's conclusory reassertion of innocence falls far short of the "fair and just" standard of Fed. R. Crim. P. 32(d). *United States v. Henry*, 459 F. Supp. 199, 200 (S.D. N.Y. 1978). Unconvinced by Suter's renewed claim of innocence, the district court at the plea withdrawal hearing determined that Suter was motivated in his request by collateral civil consequences to the plea, a reason insufficient, in the dis-

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[2] The Attorney General's Guidelines for Victim and Witness Assistance, promulgated on July 9, 1983, pursuant to the Victim and Witness Protection Act of 1982, Pub. L. 97-291, October 12, 1982, 96 Stat. 1248, provides in relevant part:

> Consistent with available resources and their other responsibilities, federal prosecutors should advocate fully the rights of victims on the issue of restitution unless such advocacy would unduly prolong or complicate the sentencing proceeding.

33 BNA Criminal Law Reporter 3329, 3331 (August 3, 1983); 48 Federal Register 33,774, 33,777 (July 25, 1983).

[3] The transcript of the October 21 hearing demonstrates that on more than one occasion the prosecutor, in addressing the district court, prefaced her comments by explicitly stating that she was not making a recommendation as to what sentences the court should impose, and that her remarks should not be interpreted as such.

trict court's opinion, to justify withdrawal of the plea: "If people are allowed to withdraw pleas for reasons as slim as those advanced here [by Suter], then the process of accepting guilty pleas would simply be a means of continuing the trial to some indefinite date in the future when the defendant might see fit to come in and make a motion to withdraw his plea." *Accord, United States v. Thompson*, 680 F.2d 1150. We find the district court properly exercised its discretion in the denial of Suter's motion to withdraw his plea. Failing to advance a "fair and just reason" for withdrawal of his plea, Suter was not entitled to an evidentiary hearing on the motion. *United States v. Thompson*, 680 F.2d at 1152.

Suter next challenges the imposition of a condition of his probation requiring him to make restitution in an amount greater than involved in the particular counts for which he was convicted. He also complains that the amount of restitution ordered far exceeded the total monetary losses specified in the 23-count indictment. Restitution, as a condition of probation, is authorized "for actual damages or loss caused by the offense for which conviction was had. . . ." 18 U.S.C. § 3651. This Court has construed § 3651 as allowing a court to require restitution of any amount up to the entire illicit gain from an ongoing scheme to defraud if the amount has been established with specificity and agreed to by the defendant. *United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir. 1982). In the present case, the record indicates the plea agreement was modified to require that Suter make restitution in specified amounts to named individuals who were defrauded as a result of Suter's coin brokerage scheme as set forth in a document entitled "Agreed Restitution of Undisputed Claims," signed by Suter and filed with the court on October 21, 1983. Although the 23-count indictment set forth the claimed monetary loss of only four of Suter's victims, totalling $23,925.10, the negotiations that took place between Suter and the government as to restitution properly included the claims of all individuals known to the government to have been de-

frauded by Suter's coin brokerage scheme. The record demonstrates that Suter fully bargained for,[4] and explicitly consented to, restitution, not only in an amount greater than the counts of which he was convicted, but also in excess of the total amount specified in the entire 23-count indictment. Under these circumstances, the sentencing court is bound by law to impose the agreed upon restitution as a condition of probation. *Phillips v. United States*, 679 F.2d 192, 194 (9th Cir. 1982). Suter cannot now complain.

Lastly, we address two remaining arguments raised by Suter. Suter claims the district court abused its discretion in denying an evidentiary hearing on his motion to dismiss the indictment for selective prosecution. This court need not reach this issue, however, since Suter failed to preserve the issue for appellate review by not complying with the requirements of entering a "conditional plea." Fed. R. Crim. P. 11(a)(2). In his reply brief, Suter asserts for the first time a claim of double jeopardy. Issues raised for the first time in a reply brief are normally not considered on appeal. *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976), citing *Finsky v. Union Carbide & Carbon Corp.*, 249 F.2d 449, 459 (7th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958). In any event, Suter has not been placed in jeopardy twice merely because he faces judgments or penalties in civil lawsuits or administrative actions based on the same fraudulent scheme for which he stands convicted in federal district court. *See, e.g., United States v. Hall*, 559 F.2d 1160, 1163 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *United States v. Barger*, 458 F.2d 396 (9th Cir. 1972) (per curiam); *United States v. Countryside Farms, Inc.*, 428 F. Supp. 1150, 1159 (D. Utah 1977).

---

[4] The record indicates that the district court requested Suter, his counsel and the government to attempt to work out a reasonable amount of restitution to the victims of Suter's fraudulent scheme before the court imposed sentence. Transcript, Hearing of September 8, 1983, p. 2.

Accordingly, we conclude that the district court fully adhered to Rule 11, and did not abuse its discretion in denying Suter's motion for leave to withdraw his guilty plea and in ordering restitution in the amount of $67,800.[5] The conviction and sentence of the district court are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] We find Suter's conclusory claim that the mail fraud statute, 18 U.S.C. § 1341, is unconstitutional clearly without merit, and not warranting discussion. *United States v. Feinberg*, 535 F.2d 1004, 1010 (7th Cir.). *cert. denied*, 429 U.S. 929 (1976) (§ 1341 not constitutionally vague).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

[February 14, 1985]

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

No. 84-1198

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RICHARD W. SUTER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 563—John F. Grady, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

[Filed August 10, 1982]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563
Violation: Title 18, United
States Code, Section 1341

UNITED STATES OF AMERICA

v.

RICHARD W. SUTER

The SPECIAL OCTOBER 1981 GRAND JURY charges:

1. At all times material herein, the defendant, RICHARD W. SUTER, owned and operated the National Investment Publishing Company, which company purported to offer a coin purchasing service to its newsletter subscribers, clients, and customers, for the purpose of investment type coins.

2. At all times material herein, the defendant, RICHARD W. SUTER, operated his business, National Investment Publishing Company, at 6545 West Addison, Chicago, Illinois, and used a mailing address of Post Office Box 7212, Main Post Office, Chicago, Illinois.

3. Beginning in or about July, 1976, and continuing to in or about November, 1981, at Chicago, Illinois in the Northern District of Illinois, Eastern Division, and elsewhere,

defendant herein, devised and intended to devise and participated and intended to participate in a scheme and artifice to defraud and to obtain money by false and fraudulent pretenses, representations and promises, said scheme and artifice to defraud in substance being as follows:

(a) newsletters and advertisements offering a coin purchasing service were mailed to National Investment Publishing Company newsletter subscribers and prospective coin purchasers;

(b) orders and monies for the purchase of coins were mailed by subscribers and customers to defendant, RICHARD W. SUTER, at Post Office Box 7212, Main Post Office, Chicago, Illinois;

(c) monies sent to defendant, RICHARD W. SUTER, were deposited by defendant in various bank accounts; and

(d) satisfactory coins were not shipped or mailed to most customers from whom monies and orders had been obtained, and some customers from whom monies and orders had been obtained received no coins.

4. It was further a part of said scheme and artifice to defraud that defendant, RICHARD W. SUTER, would and did represent in newsletters, brochures, circulars, and letters, that he would purchase coins for customers, have them graded or evaluated as to value, and ship said coins to the purchaser.

5. It was further a part of said scheme and artifice to defraud that the defendant, RICHARD W. SUTER, would and did cause to be mailed to him at Post Box 7212, Main Post Office, Chicago, Illinois, monies and orders for coins from subscribers and customers including but not limited to:

David E. Bills
Sebastopol, California

Ralph Berger
Park Ridge, Illinois

Leo Brenna
Minneapolis, Minnesota

G. G. DeHaas
Longview, Washington

Dr. Frank Diegmann
Pasadena, California

Terrance Fenwick
St. Louis, Missouri

J. C. Fitzgerald
Albert City, Iowa

Dr. McCollough
Tulsa, Oklahoma

Leo McGlade
Sacramento, California

Henry Meller
Sparta, New Jersey

Gerald E. Michel
Vandalia, Ohio

Kenneth D. Nolan
Cheektowaga, New York

Morton Goldshall
Highland Park, Illinois

Conrad Goodman
Heber Springs, Arkansas

Edward Kiehl
Seattle, Washington

Art Krause
Applegate, Michigan

Harry Lemmons
Dallas, Texas

Robert M. Lowen
Los Altos, California

Stanley J. Matys
Depew, New York

Al Schattschneider
Ripon, Wisconsin

Andrew J. Stubler
Corpus Christi, Texas

Harold Trumbull
Chariton, Iowa

Donald E. Whiting
Canton, Ohio

Arnold Zentner
Hartford, Connecticut

6. It was further a part of said scheme and artifice to defraud that defendant, RICHARD W. SUTER, would and did deposit said money into accounts at the Jefferson State Bank, and Northwest National Bank, Chicago, Illinois.

7. It was further a part of said scheme and artifice to defraud that defendant, RICHARD W. SUTER, did not provide or ship coins to some customers, and shipped unsatisfactory coins to other customers.

8. It was further a part of said scheme and artifice to defraud that defendant, RICHARD W. SUTER, would and did send letters to subscribers and customers stating that he had mailed coins to them but that said coins had been lost by the post office, that he had been unable to send coins due to personnel problems, and that coins were being evaluated or graded by grading companies, which representations were misleading and false.

9. On or about January 5, 1979, at Chicago, in the Northern District of Illinois, Eastern Division,

RICHARD W. SUTER,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly cause to be placed in an authorized depository for mail matter to be delivered by mail according to the directions thereon, an envelope addressed to:

Dr. Arnold S. Zentner
854 Farmington Avenue
West Hartford, Connecticut 06119,

containing a letter addressed to Dr. Zentner on National Investment Publishing Company letterhead.

In violation of Title 18, United States Code, Section 1341.

COUNT TWO

The SPECIAL OCTOBER 1981 GRAND JURY further charges:

1. Paragraphs 1-8 of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about September 16, 1977,

RICHARD W. SUTER,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses, representations and promises and attempting to do so, knowingly and wilfully did cause Henry Meller to place and caused to be placed in an authorized depository for mail matter an envelope containing a check in the amount of $10,887.10, the aforesaid envelope being addressed to:

National Investment Publishing Company
P.O. Box 7212
Chicago, Illinois 60680

which was delivered by mail by the United States Postal Service, in the Northern District of Illinois, Eastern Division, according to the direction thereon.

In violation of Title 18, United States Code, Section 1341.

COUNT THREE

The SPECIAL OCTOBER 1981 GRAND JURY further charges:

1. Paragraphs 1-8 of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about February 6, 1978, at Chicago, in the Northern District of Illinois, Eastern Division,

RICHARD W. SUTER,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses, represen-

tations and promises and attempting to do so, did knowingly cause to be placed in an authorized depository for mail matter to be delivered by mail according to the directions thereon, an envelope addressed to:

Mr. Irving A. Weber
Gardner and Weber
220 Main Street
Hackettstown, New Jersey 07840,

containing a letter on National Investment Publishing Company letterhead addressed to Mr. Weber.

In violation of Title 18, United States Code, Section 1341.

* * *

COUNT FIFTEEN

The SPECIAL OCTOBER 1981 GRAND JURY further charges:

1. Paragraphs 1-8 of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about January 3, 1979, at Chicago, in the Northern District of Illinois, Eastern Division,

RICHARD W. SUTER,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly cause to be placed in an authorized depository for mail matter to be delivered by mail according to the directions thereon, an envelope addressed to:

David E. Bills
2016 Coffee Lane
Sebastopol, California 95472,

containing a letter written on National Investment Publishing Company letterhead addressed to Mr. Bills.

In violation of Title 18, United States Code, Section 1341.

* * *

COUNT TWENTY-THREE

The SPECIAL OCTOBER 1981 GRAND JURY further charges:

1. Paragraphs 1-8 of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about April 1, 1980, at Chicago, in the Northern District of Illinois, Eastern Division,

RICHARD W. SUTER,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses, representations and promises and attempting to do so, did knowingly cause to be placed in an authorized depository for mail matter to be delivered by mail according to the directions thereon, an envelope addressed to:

Dr. Frank Diegmann
1986 E. Foo[illegible] Blvd.
Pasadena, California 91107

containing a letter written on National Investment Publishing Company letterhead addressed to Dr. Diegmann.

In violation of Title 18, United States Code, Section 1341.

A TRUE BILL:

[Signature of Foreperson]

[Signature of
Acting United States Attorney]

[Dated August 17, 1982]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Magistrate,
Honorable OLGA JURCO—Room 2402

Cause No. 82 CR 563-1 (Judge Grady's Case)

Title of Cause:
UNITED STATES v. RICHARD W. SUTER

Brief Statement of Motion:
ARRAIGNMENT AND PLEA

* * *

Arraignment held. Defendant enters plea of not guilty to all 23 counts. 2.04 conference to be held by August 19, 1982. Pretrial motions to be filed by September 8, 1982. Response to be filed by September 13, 1982. All briefs to be filed with Judge Grady. Order own recognizance bond set for $4,500. Bond enlarged to permit travel within Continental U. S.

/s/ Jurco, M.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563

UNITED STATES OF AMERICA, Plaintiff,

v.

RICHARD SUTER, Defendant.

ORDER

The request in paragraph 1(b) of defendant's motion for a bill of particulars is allowed. The Government should state, in general terms, the respect or respects in which the coins received by defendant's customers were "unsatisfactory."

The balance of the motion for a bill of particulars is denied.

In response to defendant's other discovery motions, the government has furnished most of the information requested. To the extent that those motions request information the Government has declined to produce, they are denied.

This case is set for a status hearing on November 2, 1982, at 9:45 a.m.

DATED: October 26, 1982

ENTER: /s/ John F. Grady
United States District Judge

[Filed June 3, 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge John F. Grady
No. 82 CR 563

UNITED STATES OF AMERICA

vs.

RICHARD W. SUTER

MOTION TO DISMISS THE INDICTMENT FOR SELECTIVE PROSECUTION OR FOR DISCRIMINATORY ENFORCEMENT FOR HIS POLITICAL ACTIVITIES

Now comes the Defendant, RICHARD W. SUTER, by his attorney, GORDON JAMES ARNETT, stating, pursuant to Fed.R.Crim.P. 12(b)(2), as follows, together with the attached Affidavit, Exhibits, and Memorandum.

1. Defendant Richard Suter has been active politically, particularly in attempts to lower taxes. His prominence in that kind of activity is illustrated (Exhibit A), for example, by a mailing piece distributed by the League of Women Voters in Urbana, Illinois, with reference to the last, November 2nd, election; and said circular reads in part as follows:

"THREE COUNTY TAX QUESTIONS:
VOTE NO NOVEMBER 2 . . . .
PETITION SPONSORS . . .

James Tobin and *Richard Suter of National Taxpayers United of Illinois* claimed the county had a huge surplus . . . .

PETITION SPONSOR INDICTED BY FEDERAL GRAND JURY

Richard W. Suter, the financial adviser on the petition drive, was recently indicted on 23 counts of mail fraud . . . . *Last year he was sued by the Securities and Exchange Commission to halt sales of his investment newsletters.* . . .

. . . Mr. Tobin . . . is trying to build a political base and is running a candidate for governor." [Emphasis added]

2. Just as the aforesaid circular made reference to the SEC litigation, another example of the governmental harassment of defendant herein because he has been marked as a trouble maker and may be forced out of business and even sent to prison for his political activities as a result of a vendetta by a disgruntled SEC employee who has opposite political beliefs, is Exhibit B, page 6 of a circular from the Institute for Economic Research:

"The Securities and Exchange Commission has issued a press release setting forth its version of the circumstances surrounding the forced merger of the *Texas Money Fund.* . . .

According to the SEC, Texas Money Fund's investment adviser committed numerous violations of Federal securities laws in managing the troubled fund. . . . As punishment, the SEC revoked the adviser's registration and barred the principals from managing money funds in the future.

The Other Side of the Story

Investigative reporting by The Donoghue Organization, the money fund statistical gatherer, has un-

covered evidence that the *Texas Money Fund* was forced out of business as a result of a vendetta by disgruntled SEC employees.

. . . The error was corrected, but the SEC's staff marked the fund's adviser as a trouble maker."

3. As recently as May 6, 1983, in a news article in the *Chicago Sun-Times* headlined "Thompson calls tax hike only solution", there is the statement (see Exhibit C),

"More taxes, said James Tobin of Taxpayers United of Illinois, would 'provide jobs to cronies of the governor,' and abet a 'power play' by education lobbyists 'to steal even more of the taxpayers' money for the benefit of bureaucrats.'

"A longtime anti-tax activist, Tobin said supporting more taxes would be 'a vote for less business opportunities and more unemployment.'

[Governor] Thompson said most of the $1.9 billion in new revenue he wants is needed just to pay the 'debts of recession,' but he declined to detail how he would spend more than $400 million he has said would become available to restore cut programs and expand state services."

4. Defendant Suter's political associate, James Tobin, is the president of the National Taxpayers United of Illinois, an organization in which Richard Suter is also active, and has been for several years, prior to the times when the Postal Inspector, the U. S. Attorney, and the SEC began investigating and harassing him. See Exhibit D which includes an article in the *Chicago Tribune* in 1980 by Columnist Jack Mabley, and an advertisement for the organization, NTU.

5. Another example of the extent of the Discriminatory Enforcement against Richard Suter is this. On May 17, 1983, in a civil case before Judge Parsons, as distinguished from the civil SEC case before Judge Hart and this

criminal case before Judge Grady, there was a hearing in the case where one of the government's witnesses in this criminal trial, Dr. McCullough, is suing Suter for money damages and racketeering triple damages. Suter is represented there by an entirely different attorney who told the Court that Suter would not make a settlement at this time because, to do so, could be used against him in the criminal trial. Plaintiff McCullough's attorney then phoned the Assistant U. S. Attorney prosecuting this case to ask her how recently this criminal attorney had spoken with her. This contact between the attorney in the civil case and the U.S. Attorney in this criminal case appears to Suter to be improper as showing a deliberate coordination between the civil and criminal litigation, by attempting to obtain admissions from Suter in the civil litigation to be used to convict him in the criminal litigation. In fact, since he took the Fifth Amendment for that very reason at a recent deposition, that appears to be the reason why on May 17th, Judge Parsons accelerated the civil trial to a date before the June 27th trial date now set in this criminal case, although criminal cases are supposed to have priority.

6. This criminal case is apparently part of a series of Administrative, Civil, and Criminal Proceedings pending simultaneously against this defendant as a result of discriminatory enforcement of penal, civil, and administrative laws and procedures being used in the institution of this prosecution and the other procedures for the reason that Defendant has been actively engaged in political activities including the formation of the new Taxpayers Party, opposed to the political beliefs of certain government agents and officials.

WHEREFORE, Defendant prays for an Order setting a hearing date to allow defendant to present evidence that he has been singled out for discriminatory prosecution for his political activities; and for an Order dismissing the Indictment for such selective prosecution.

/s/ Gordon James Arnett
Defendant's Attorney

GORDON JAMES ARNETT
Attorney for Defendant
5875 N. Lincoln Ave.
Chicago 60659
334-0400

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563

UNITED STATES OF AMERICA

vs.

RICHARD W. SUTER

AFFIDAVIT IN SUPPORT OF
MOTION TO DISMISS THE INDICTMENT
FOR SELECTIVE PROSECUTION
FOR POLITICAL ACTIVITIES

I, RICHARD W. SUTER, being first duly sworn under oath, depose and state as follows:

1. I am the defendant in this criminal case.

2. I have been actively involved in political activities since at least 1975. I was Illinois Chairman of the Libertarian Party in 1976. My activities were and still are directed toward reduction in taxes and in governmental regulation generally, and into the private and economic lives of citizens particularly. I have attended many political rallies and meetings throughout Illinois, frequently accompanied by my friend and associate, James Tobin, president of the National Taxpayers United of Illinois. We were involved with the formation of a new third party, the Taxpayers Party, which ran a full slate of candidates for State offices in the November 1982 General Election. They received more than five percent of the vote, the amount needed to qualify as an established political party.

3. As recently as May 21st, 1983, Jim Tobin, as president of the aforesaid political organization, was a guest on Chicago's 24-hour Talk Show, radio station WIND. Included in his answers to citizens calling in to the radio program were these comments:

> "The Multiplier is a great way to shift the blame from the local politicians who *are* at fault to the State, to confuse the matter; and, of course, the multiplier *does* result in higher taxes when it's raised. . . . However, we do support legislation which would roll back property tax assessments at least 50% for everybody, eliminate the state-imposed multiplier . . ., and then keep tax rates as the only variables which can be raised or lowered. . . . What *we* want in Illinois is a system similar to what they have in California now, after Proposition 13 cut the property taxes 60% for everybody in the State back in 1978."

LADY CALLER: "I hope you're successful and God bless you."

. . .

JIM TOBIN: "The system . . . is set up to benefit politicians and special interest groups that benefit from high taxes. . . . I teach this in my Economics, Elementary 101 course. . . . The so-called Fair Market Value Assessment System we have now is a fraud; it was concocted by the special interest groups in Springfield such as the Illinois Education Association, the Chicago Teachers Union, and other unions and special interest groups that benefit from very high taxes. . . . Home Rule units have unlimited taxing powers. . . . We have to get people elected . . . eventually in the Governor's office; because we have a man in the governor's mansion now who will do nothing to cut property taxes and . . . Governor Thompson will also do nothing to expand the voter initiative laws. I tried to work with him on this in the past and he just has not supported us. . . . We very much support indexing at the federal level. . . ."

WIND HOST: ". . . If you talk to politicians about the Governor's lobster and the Governor's helicopters and that sort of thing, the answer *constantly* comes back, 'It's a drop in the bucket. It wouldn't make any difference.' . . ."

TOBIN: ". . . After we finally beat them down for the fourth time, in a little over two years, they decided they would find ways to cut spending and they did. . . . There's an incredible potential for savings on the part of governments . . . around the State of Illinois. . . . There's no limit to the needs of . . . special interest groups to more of the taxpayers' money. Those needs are unlimited."

I, RICHARD W. SUTER, Defendant herein, agree with all those principles and have been making similar statements at political meetings throughout the State. I have attacked the Governor's policies on numerous occasions. He does not like me and our organization, N.T.U.I. He is the former United States Attorney, and the present U. S. Attorney was one of his assistants.

4. In 1980, an individual with similar political beliefs was passing out political handbills at an Elevated Station on the North Side of Chicago. A young woman took one, as I was informed and do believe; and he said that she inquired whether this was the organization that Richard Suter was associated with. He told her it was. She indicated she was opposed to its principles. He asked her name, and she told him that her name was Barbara and that she worked for the S.E.C. Shortly thereafter, the Securities and Exchange Commission began an administrative proceeding against me and my company, the National Investment Publishing Company, which proceeding is pending before the Commission on appeal. Simultaneously it filed a related civil action now pending in the same court as this criminal proceeding, but it is before

Judge Hart, who recently found me in contempt, at the SEC's request.

* * *

> "The group's leaders and some county officials traded angry shouts during a meeting July 16 that begin (sic) the petition drive. . . ." (See Exhibit E)

Without a doubt, where reference is made to "the group's leaders", they are referring to James L. Tobin and myself. I was present and participated in the "angry shouts" between us "and some county officials".

7. On November 18, 1981, there was an article in the *Decatur Herald-Review* newspaper, headed by a large photograph captioned "James Tobin apparently inspired 255 to sign petitions." The headline (Exhibit F): "Tax-fighter Tobin helps launch STOP attack". That 3-column news article included,

> "Tobin and Richard Sutter (sic; should be Suter), executive vice president of the same organization, were brought to Decatur by Tom Allen, president of STOP (Stop Taxing Our Property). . . .
>
> Tobin has taken his case all over the state, and claims to have had a hand in many successful tax-cutting drives.
>
> Tobin acknowledges he is not too popular in some circles. . . .
>
> 'I take great pride in that,' he said. . . . Tobin and Sutter had spewed out figures showing the county to be wasting hundreds of thousands of dollars. . . .
>
> In his discussion, Sutter cited a landscaping fund for work around the County building. Sutter said the fund amounts to more than $9,000.
>
> County Sheriff Stephen Fisher, standing at the back of the auditorium, rolled his eyes and said that for that figure to be true, the county should have planted 500 trees.

'*This man is dangerous*,' Fisher said" (emphasis added).

This illustrates very well the attitude of various law-enforcement officials, from the Sheriff just referred to, to Governor Thompson himself, against the tax-cutting and government-reducing political activities of myself and my associates.

8. As a further example of the coordinated selective prosecution of me by various governmental agencies including the Securities and Exchange Commission and the United States Attorney's office, said discriminatory enforcement against me being a direct result of my political activities, is the testimony of one of the SEC's witnesses, who stated that, although he had contacted the U.S. Postal Inspector about not getting a refund for a subscription, he never did hear anything from the Postal Inspector. He heard instead from the SEC's Barbara Schmidt. It has been the Postal Inspector who has built what evidence the United States has as a basis for my indictment. I do not believe that the attorneys for the SEC and for the U.S. Attorney have not been in contact about prosecuting me.

9. Further, at one point, I think in 1979, the Postal Inspector served a subpoena upon Dow-Jones & Company demanding copies of any advertising I had run in their publications. As a result, the Postal Inspector received a copy of a small classified I had run for a tax shelter. He forwarded that information to the Illinois Securities Division of the Secretary of State's office who scheduled a hearing.

FURTHER AFFIANT SAYETH NOT.

/s/ Richard W. Suter
RICHARD W. SUTER

STATE OF ILLINOIS)
) SS:
County of Cook)

RICHARD W. SUTER, being first duly sworn under oath, deposes and says that he has read and understands the foregoing statements which are true to his personal knowledge except where stated to be on information and belief, they are true to the best of his information and belief.

/s/ Richard W. Suter
RICHARD W. SUTER, Affiant

Subscribed and sworn to
before me this 3rd day
of June, 1983.

/s/ Linda Schlie
NOTARY PUBLIC

My Commission expires October 7, 1986

[Dated June 22, 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563

UNITED STATES OF AMERICA, Plaintiff,

v.

RICHARD W. SUTER, Defendant.

ORDER

The motion of defendant to dismiss this indictment on the ground of selective prosecution for political activities is denied. The motion of the defendant for an evidentiary hearing on that motion is also denied.

Defendant's motion and supporting memoranda do not indicate that defendant has any evidence to support his contention that he is being prosecuted because of his political activities. The exhibits attached to the motion do no more than suggest that defendant is active in an organization opposed to excessive taxation and wasteful government spending. Most of the newspaper articles attached to the motion are about the leader of this organization, a person other than the defendant.

The moving papers do not contain a single fact which indicates that anyone connected with the prosecution of this mail fraud case is concerned with or motivated in any way by the defendant's tax protest activities. An evidentiary hearing would be simply a fishing expedition.

Secondly, defendant has not offered to show that persons not involved in tax protest movements are treated differently from defendant as far as mail fraud prosecutions are concerned. The first paragraph of defendant's reply memorandum indicates that he misunderstands the nature of a selective prosecution challenge.

DATED: 22 JUN 1983

ENTER: /s/ John F. Grady
United States District Judge

[Filed June 24, 1983]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563
Judge John F. Grady

UNITED STATES OF AMERICA

vs.

RICHARD W. SUTER

PLEA AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, by DAN K. WEBB, United States Attorney for the Northern District of Illinois, and the defendant, Richard W. Suter, and his attorney, Gordon James Arnett, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the indictment in this case with violations of Title 18, United States Code, Section 1341.

2. Defendant has read the charges against him contained in the indictment, and those charges have been fully explained to him by his attorney.

3. Defendant fully understands the nature and elements of the crimes with which he has been charged.

4. Defendant will enter a voluntary plea of guilty to Counts Three and Fifteen of the indictment in this case.

5. Defendant agrees that this Plea Agreement shall be filed and become a part of the record in this case.

6. Defendant will plead guilty because he is in fact guilty of the charges contained in Counts Three and Fifteen of the Indictment. In pleading guilty to thses counts, defendant acknowledges that:

(1) As charged in Count Three of the Indictment, he owned and operated the National Investment Publishing Company through which defendant published a newsletter directed to coin collectors and those who might be interested in coins as an investment. Defendant further acknowledges that during the years 1976 through 1981 he offered through the newsletter to obtain coins on behalf of collectors or investors in return for a fee or commission on each sale. In connection therewith defendant solicited and received money from various collectors and investors which money had been sent for the purpose of defendant obtaining coins either on a discretionary basis or specific request basis.

Defendant Suter also acknowledges that during this time period he had occasion to receive monies but thereafter failed to provide the coins which had been requested or to provide any coins at all or to make a refund. Defendant further acknowledges that he employed various artifices and devices to avoid returning monies to unhappy customers and to explain his failure to provide coins to the customers. Among these artifices and devices were representations that defendant had mailed or shipped the coins and that they must have been lost in shipment, or the coins were then being graded or authenticated by a grading and authentication service, or that defendant had severe personnel problems which was the reason that he had failed to provide coins or make a refund, or that the

weather had prevented him from completing orders and making refunds.

With reference to Count Three, defendant acknowledges that in September, 1977, Henry Meller of New Jersey sent defendant $10,887. Thereafter defendant failed to provide any coins or make a refund despite repeated inquiries and demands by Mr. Meller and his lawyer, Irving Weber. On or about February 6, 1978, in response to inquiries and demands made by Meller and Weber, defendant mailed a letter to Mr. Weber in Hackettstown, New Jersey, wherein he represented that he had mailed some coins to Mr. Meller which Meller had not received. He also stated that he had filed a claim with the Post Office and could expect a settlement in six months. Defendant also claimed that he had "confirmed orders" for the remainder of Meller's order. All of these representations were false when made, the defendant well knowing that they were false and were designed to convince Mr. Meller and Mr. Weber of his intent to perform the promised services.

(2) As charged in Count Fifteen of the Indictment, defendant acknowledges that in May, 1978, David E. Bills, of Sebastopol, California, sent defendant $6,000 to establish a discretionary coin account. After several months of correspondence, defendant mailed Bills a coin which he valued at $950. Bills was not satisfied with the coin and mailed it back to Suter via registered mail in October, 1978. In January, 1979, defendant mailed a letter to Bills in California wherein he stated that while he received Bill's letter, there was no coin enclosed. The representation was false when made and the defendant knew it was false at the time. This statement was made to assuage the concern that had been expressed by Mr. Bills and his lawyer.

7. Defendant understands the counts to which he will plead guilty carry the following penalties:

(1) Count Three carries a maximum penalty of five years imprisonment and a maximum fine of $1,000.

(2) Count Fifteen carries a maximum penalty of five years imprisonment and a maximum fine of $1,000.

Therefore, the total potential sentence carried under the counts to which defendant will plead guilty is ten years imprisonment and a $2,000 fine.

8. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

(1) If defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

(2) If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. Defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt, and that it was to consider each count of the indictment separately.

(3) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count separately, whether or not he was persuaded of defendant's guilt beyond a reasonable doubt.

(4) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(5) At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

9. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights.

10. Defendant understands that the United States Attorney's Office will fully apprise the District Court and the United States Probation Office of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters, including all matters in aggravation and mitigation relevant to the issue of sentencing.

11. Defendant understands that the United States Attorney reserves the right to notify any state or federal agency by whom defendant is licensed, or with whom defendant does business, of defendant's conviction.

12. At the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose.

13. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this agreement, to induce defendant to plead guilty.

14. It is understood by the parties that the sentencing judge is neither a party to nor bound by this agreement and is free to impose the maximum penalties as set forth in paragraph seven above.

15. After sentence has been imposed on the counts to which defendant pleads guilty as agreed herein, the government will move to dismiss the remaining counts of the indictment.

16. Should the judge refuse to accept this agreement, this agreement will become null and void and neither party shall be bound thereto.

AGREED:

/s/ Dan K. Webb
DAN K. WEBB
United States Attorney

/s/ Candace J. Fabri
CANDACE J. FABRI
Assistant United States Attorney

/s/ Richard W. Suter
RICHARD W. SUTER
Defendant

/s/ Gordon James Arnett
GORDON JAMES ARNETT
Attorney for Defendant

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD W. SUTER, Defendant.

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before The Honorable JOHN F. GRADY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Wednesday, June 22, 1983, at the hour of 2:30 p.m.

PRESENT:

HON. DAN K. WEBB, United States Attorney
(219 South Dearborn Street, 15th Floor
Chicago, Illinois 60604) by
MR. DANIEL W. GILLOGLY and
MS. CANDACE J. FABRI

appeared on behalf of the plaintiff;

MR. GORDON JAMES ARNETT
(5865-75 North Lincoln Avenue
Chicago, Illinois 60659)

appeared on behalf of the defendant.

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* Numbers in brackets refer to the pagination of the Official Court Reporter's transcript of proceedings.

[2] (Whereupon the Court heard other matters on the call, after which the following proceedings were had herein:)

THE CLERK: 82 CR 563, United States of America v. Suter, for status hearing, for ruling on motion.

* * *

THE COURT: I have an order that I am filing today. I would like you to take a minute to read it before we proceed further.

THE COURT: I am filing an order denying the defendant's motion to dismiss this indictment on the ground of selective prosecution.

My secretary has been in touch with Ms. Fabri earlier with a view towards perhaps advancing the commencement of this trial because of certain time constraints I have. As I understand it, the government would be ready to proceed on Friday.

MS. FABRI: I think we could be prepared to pick a jury on Friday, and on the assumption that I get my voice back or I convince Mr. Gillogly, who will be my trial partner, I think we can proceed with opening statements

* * *

[4] think three of the counts relate to that particular witness.

THE COURT: All right.

MS. FABRI: Other than that, we anticipate that we can try the case in one week, and I am certain the government can rest well before your Thursday hearing. That would give Mr. Arnett an opportunity to prepare his defense.

MR. ARNETT: Your Honor, in view of this order that you just advised us of, I would like to file a motion asking leave to appeal the order that you just entered. I realize that ordinarily it is civil cases that are certified, but this—

THE COURT: Do you have a copy of this?

MS. FABRI: No, I do not.

THE COURT: Well, here are some extra copies.

MS. FABRI: Thank you.

(There was a brief interruption, after which the following further proceedings were had herein:)

THE COURT: There is a rule that allows double jeopardy questions to be appealed on an interlocutory basis, but I do not think selective prosecution.

MS. FABRI: That is exactly right, and I would be prepared to provide the Court with cases on that.

THE COURT: You do not have to do that. That [5] would certainly be my understanding of the law, and I will accept your representation that that is the law.

You do not have anything to the contrary, do you, Mr. Arnett?

MR. ARNETT: No.

THE COURT: You have analogized to the civil rule.

MR. ARNETT: My view and my client's view is that the most definite kind of proof that this is selective prosecution is that there are simultaneously a criminal and an SEC civil and an SEC administrative and some other civil, and it is kind of related to double jeopardy, but, of course, it is not the same thing.

THE COURT: Well, the petition of the—well, I have nothing to do with whether or not you will appeal. That is really a matter for the Court of Appeals, but I will interpret your petition for permission to appeal as a motion for a stay of this case pending your appeal, and that motion will be denied.

Now, if you want to appeal anyway and attempt to obtain relief from the Seventh Circuit, that is your privilege.

MR. ARNETT: Well, your Honor—

THE COURT: I would not advise it. I do not think you would have a chance in the world, but that is for

* * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 563

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD W. SUTER, Defendant.

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before The Honorable JOHN F. GRADY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, June 24, 1983, at the hour of 10:05 a.m.

PRESENT:

HON. DAN K. WEBB, United States Attorney
(219 South Dearborn Street, 15th Floor
Chicago, Illinois 60604) by
MR. DANIEL W. GILLOGLY

appeared on behalf of plaintiff;

MR. GORDON JAMES ARNETT
(5865-75 North Lincoln Avenue
Chicago, Illinois 60659)

appeared on behalf of the defendant.

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* Numbers in brackets refer to the pagination of the Official Court Reporter's transcript of proceedings.

[2] (The following proceedings were had in open Court:)

THE CLERK: 82 CR 563, United States of America v. Richard W. Suter, for change of plea.

MR. GILLOGLY: Good morning, your Honor; Dan Gillogly for the government.

MR. ARNETT: Gordon Arnett for the defendant Richard Suter, who is before the Court.

THE COURT: Good morning.

THE DEFENDANT: Good morning.

MR. GILLOGLY: Your Honor, I think we are here on a plea agreement, if I may have leave of Court to tender this to your Clerk?

THE COURT: Yes.

(There was a brief interruption, after which the following further proceedings were had herein:)

THE COURT: I have read the plea agreement which is signed by the attorneys for the government and the defendant and, also, by the defendant personally.

Have you read this plea agreement before you signed it, Mr. Suter?

THE DEFENDANT: Yes.

THE COURT: Do you agree with all the statements contained in it?

[3] THE DEFENDANT: The transactions related are quite old, and I only saw it this morning, and my recollection of one of those areas is not in accordance with that, but my attorney so suggested that I sign it.

THE COURT: Well, I want to have one thing clear here, not one, but many, but at the threshold, I want to have one thing clear and; that is, that you are proposing to plead guilty to two counts of this indictment, which charge you with the crime of mail fraud. The indictment spells out what the scheme was.

What is alleged basically is that you took money from people under false pretenses and that you made false

representations to avoid refunding their money and that, basically, this involved a scheme whereby you took money in return for a promise to give coins to people or send them coins, and you did not send them coins, and you kept their money.

The indictment does not charge negligence or mismanagement or forgetfulness or any innocent fact situation. What it charges in plain terms is a scheme to defraud and the use of the mails in execution of that scheme. Sometimes people plead guilty, and then I find out that they change their minds, and they tell the Probation Officer, "Well, I did not really mean to do this. It was all an accident," and, in effect, "I am not guilty."

[4] I do not want that to happen here. I want you to understand that what you are pleading guilty to is a scheme intentionally to defraud these people who were your customers in this coin affair.

Are you prepared to plead guilty on that basis?

MR. ARNETT: One might well get the impression, your Honor, from the wording of this agreement that he cheated all of his customers, which—

THE COURT: Well, no. He is only pleading guilty to having devised this scheme and then having mailed these two pieces of mail matter in execution of the scheme. It is not necessary that he have defrauded all of his customers or even that he have intended to defraud all of his customers. All that is necessary is that he have done what is alleged in the indictment, and proof that he intended to defraud less than all of the persons named in the indictment would be sufficient to warrant a conviction.

In other words, the government does not have to prove everything it alleges. It merely has to prove enough of what it alleges to establish that the scheme described in the indictment did exist.

MR. ARNETT: I have discussed it thoroughly with him, and I think as to these two people here, he has agreed that those facts are correct and that they did not get [5] their money back.

THE COURT: Well, Mr. Suter, you have heard what I just said. What is your position? I am not trying to talk you out of pleading guilty, but I want to make sure you are pleading guilty to what I understand the indictment to charge and that you and I have a meeting of minds as to what it is we are doing here.

THE DEFENDANT: Well, first of all, the nature of the transaction was I was acting as an agent for people. We did not maintain that we had any inventory of coins or anything like that. We were going out to seek things that we did not possess.

THE COURT: Yes.

THE DEFENDANT: The government's contention, it seems to me, is that I did not go out and seek these things in a good faith way. I think that is what their contention is.

THE COURT: Is that a correct characterization of the government's theory of the case, Mr. Gillogly?

MR. GILLOGLY: In part, Judge.

THE COURT: Have I overstated what it is that the government is contending?

MR. GILLOGLY: No. I think your Honor has the gist of it.

The government's intention, as set forth in [6] the indictment—the Grand Jury intention—that there was a scheme to defraud and that Mr. Suter advertised and represented to the coin-collector, coin-investment segment of our society that he had a coin service and that customers could send him funds to establish an account, either a discretionary account; that is, where Mr. Suter would use his expertise and his discretion in purchasing

certain coins on behalf of these collectors or investors, or there would be specific requests made to Mr. Suter: "Purchase me an"—only for an example—"1876 Morgan dollar," or something to that effect.

The government's evidence at trial would show that over the course of these three to four years, Mr. Suter had a repeated history of failure to provide coins, failure to provide refunds, and associated with that were numerous false representations to customers as to why orders had not been filled.

Some of those representations are set out in the plea agreement; for example, bad weather, personnel problems, your coins, I mailed to you, but they were lost in the mail.

We are prepared to show with evidence—Mr. Suter has seen our evidence as has Mr. Arnett—that these representations made to these various customers were false. In other words, this was not, as your Honor put it, [7] a bad business judgment-type case or negligence case, that this was a situation where Mr. Suter was receiving moneys, keeping the moneys, avoiding repaying the moneys, and providing nothing but excuses for failure to supply coins.

Mr. Arnett points out—and I quickly hasten to add that it is not our contention that Mr. Suter failed to provide each and every single customer he had with coins. That is not our proof. In fact, our proof would clearly show that Mr. Suter indeed did provide some coins to some customers and that indeed Mr. Suter may well have some satisfied customers. We do not think that that is something—that is something he might want to bring to the Court's attention, and we do not contest that fact, but we do not think it detracts from the scheme alleged in the indictment, nor does it detract from the facts contained in the plea agreement to which Mr. Suter has affixed his signature.

I know I have rambled somewhat, Judge.

THE COURT: No, you have not. You have been very responsive to my questions.

Mr. Suter, what do you say in response to Mr. Gillogly?

THE DEFENDANT: Let's see if I remember where I was here.

THE COURT: Well, let me see if I can help.

[8] THE DEFENDANT: Okay.

THE COURT: The government would expect to prove here, and whether they can do it is something I do not know—that is what you have to tell me, whether you agree that this is what the case is about.

What the government would expect to prove is just what Mr. Gillogly said, that you were taking money from people and in many instances not delivering what you promised to deliver in return for the money and that you were making false excuses for the purpose of retaining their money.

Now, that is what this case is about. If you do not agree that that is what the case is about, I do not want you to plead guilty. You have to agree that that is what the case is about before I will take your plea.

THE DEFENDANT: Yes, I agree.

THE COURT: All right. You agree that you did that?

THE DEFENDANT: Yes.

THE COURT: All right. Well, you seem to me to be a very intelligent person, and I am satisfied from our discussion here that you understand the nature of my questions and that your assent is a voluntary and meaningful one.

Now, let's just take a look at these two [9] counts to which you propose to plead guilty.

MR. GILLOGLY: Your Honor, perhaps I might suggest that the defendant be sworn.

THE COURT: Yes.

Mr. Martinez, will you administer the oath to the defendant?

THE CLERK: Yes, your Honor.

(The defendant was sworn.)

THE COURT: In Count III of the indictment, Mr. Suter, it is alleged that for the purpose of executing the scheme we have been describing here, you caused a letter to be sent through the United States mail to a Mr. Irving A. Weber in Hackettstown, New Jersey, containing a letter to him and that this occurred on or about February 6, 1978. In the plea agreement, that particular mail matter is more particularly described.

MR. GILLOGLY: It is the second full paragraph on page 2, your Honor.

THE COURT: Yes. In this letter, you stated to Mr. Weber that you had mailed some coins to a Mr. Meller, M-e-l-l-e-r, and that you had filed a claim with the Post Office and that you had confirmed orders for the remainder of Mr. Meller's order. It is alleged here that those representations were false and that they were made for the purpose of carrying out the scheme to defraud that is [10] described in Count I of the indictment.

Do you understand what you are charged with in Count III?

MR. ARNETT: You said Count I at one point. It is Count III.

THE COURT: It is Count III, but the scheme to defraud is described in Count I, and then it is realleged in Count III.

MR. ARNETT: I am sorry.

THE COURT: Do you understand what you are charged with in Count III, Mr. Suter?

THE DEFENDANT: Yes, I understand what it says.

THE COURT: Do you agree that that is what happened? Do you agree that that is what you did?

THE DEFENDANT: Well, if I were to review all the paper work from 1978, but I think whether I or somebody who was an employee of mine made those representations,

which I would probably be responsible for. That probably happened.

THE COURT: Did you have employees who worked for you in this operation?

THE DEFENDANT: Yes.

THE COURT: Did they write letters pursuant to your directions?

THE DEFENDANT: At times and sometimes pursuant to their own direction.

[11] THE COURT: Does anybody have a copy of this particular letter?

MR. GILLOGLY: Judge, I did not bring it up with me. If your Honor would want to take a short recess, I can go get it.

THE COURT: It might have a signature on it.

MR. GILLOGLY: It does, Judge, and I think it has some initials on it.

THE COURT: Why don't we take a brief recess to get it here.

MR. GILLOGLY: I will bring it right up, your Honor.

THE COURT: We will recess for a few minutes.

(There was a brief recess, after which the following further proceedings were had herein:)

THE CLERK: United States v. Suter.

THE COURT: Before we get to the Suter case, let's call that other case for just a moment.

(There was a brief recess, after which the following further proceedings were had herein:)

THE CLERK: 82 CR 563, United States v. Suter.

THE COURT: Mr. Gillogly, were you able to find that letter?

[12] MR. GILLOGLY: I did, your Honor, and Mr. Suter and Mr. Arnett have been reviewing it during the recess.

THE COURT: What is the situation on that particular letter that is mentioned in Count III, Mr. Suter?

THE DEFENDANT: Well, it appears to me that based on all the information I can remember that these statements—this statement that has been underlined in blue ink is false.

MR. ARNETT: What does that statement say?

THE DEFENDANT: "We have filed a claim with the Post Office." I do not think in 1978 we were sufficiently organized, just administrative.

THE COURT: Were you responsible for the mailing of that letter?

THE DEFENDANT: Well, I dare say it was done to some extent with my knowledge.

MR. GILLOGLY: Judge, perhaps this will refresh Mr. Suter's recollection.

The initials at the bottom of the letter read capital RWS/abm, in small letters, a typical secretarial notation. The government has evidence to the effect or a witness, who was formerly a secretary to Mr. Suter, who will testify that Mr. Suter typed many things on his own. As a matter of fact, the initials, abm, stand for "all by myself." So I think that Mr. Suter is clearly the author or this [13] letter, if not the actual typist himself.

THE COURT: Do you agree with that, Mr. Suter?

THE DEFENDANT: It does not always mean that. But I do not—

THE COURT: Did you have anybody named abm?

THE DEFENDANT: No, we did not. I do not think I signed it, but I am willing to say that it was done at—I was aware that this letter was going out.

THE COURT: Now, I do not want to pull teeth here. If you are not telling me you are guilty, I do not want you to plead, and I am not asking you these questions for the purpose of embarrassing you or rubbing your nose in it or anything like that. I just want to make sure that I have got somebody who is on the same track as I am in this procedure.

Do you understand what I mean?

THE DEFENDANT: Okay.

MR. GILLOGLY: Just for the record, your Honor, I think Mr. Suter should understand—I am sure he does—that he is still under oath.

THE COURT: You do understand that?

THE DEFENDANT: Yes.

MR. GILLOGLY: And the consequences of that oath.

THE COURT: Well, now, you say that only one of the three respects mentioned by the government is actually false?

[14] THE DEFENDANT: I am sorry. What respect are we talking about?

THE COURT: Let me see the letter.

MR. GILLOGLY: Very well, your Honor.

(There was a brief interruption, after which the following further proceedings were had herein:)

MR. GILLOGLY: Judge, if your Honor is making reference to the second paragraph of page 2, the second full paragraph of page 2, the letter contains several representations including that Mr. Suter had mailed coins to Mr. Meller which Meller had not received, that—

THE COURT: Now, had you mailed coins to him?

THE DEFENDANT: I have no information one way or another. I cannot make any statement about that.

THE COURT: Is that the kind of representation you would have made without regard to its truth?

THE DEFENDANT: Not as a regular course of action.

THE COURT: How about as an irregular course of action?

THE DEFENDANT: Anything is possible in an irregular course of action.

THE COURT: Are we going to have this much difficulty with each step of this thing?

* * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD W. SUTER, Defendant.

Docket No. 82 CR 563
Chicago, Illinois
October 21, 1983—10:20 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

TRANSCRIPT ORDERED BY:
MR. GORDON J. ARNETT
MR. CHARLES GLICK

APPEARANCES:

For the Plaintiff:
HON. DAN K. WEBB
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604, by
MS. CANDACE J. FABRI

For the Defendant:
MR. GORDON J. ARNETT
5865-75 North Lincoln Avenue
Chicago, Illinois 60659

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* Numbers in brackets refer to the pagination of the Official Court Reporter's transcript of proceedings.

Also Present:
MS. CLAUDIA LOVELETTE
MR. CHARLES GLICK
PROBATION OFFICER HANIS

Court Reporter:
LAURA M. BRENNAN
219 South Dearborn Street, Room 1918
Chicago, Illinois 60604

* * *

[6] "Under all the circumstances, we are convinced that the public interest requires the revocation of Suter's investment advisor registration and his bar from association with any investment advisor."

I didn't understand what that meant, Judge, and I called the SEC and I asked them what does it mean to bar Mr. Suter from acting as an investment advisor.

They advised me that although Mr. Suter has an absolute right to appeal this administrative decision, he doesn't have an absolute right to a stay of it. So that if this administrative decision does go into force and effect by the denial of a stay from either the Seventh Circuit or the District of Columbia Circuit Court, the result of it would be that Mr. Suter cannot publish his newsletter. If Mr. Suter attempted to publish his newsletter, according to the SEC they would proceed on a contempt violation, again in front of the Securities & Exchange Commission.

Judge, I think a very serious question is presented to the Court as to how Mr. Suter can reasonably be expected to make restitution. My recollection of the presentence investigation is Mr. Suter valued his newsletter company at about $400,000. He had, however, Judge, about another $100,000 in current assets, including his house, some stock, and some other matters.

[7] I would urge you, your Honor—I recognize that you are considering a sentence of probation and, of course, pursuant to the plea agreement, I can make no recommendation, but I submit, your Honor, you have a great deal of flexibility built into the system.

Mr. Suter, if he were to make prompt restitution, could appear before your Honor within 120 days of imposition of sentence and ask for a motion to reduce if you were inclined, your Honor, to give Mr. Suter a sentence, which would be some incentive to him to make prompt restitution from his current assets now that his future earning ability is so questionable.

I would urge you, Judge, although I am not requesting or recommending a sentence of incarceration—pursuant to our plea agreement, I cannot do that, and I understand that the Court is inclined to give a sentence of probation if Mr. Suter were to agree to make restitution; but, Judge, if you impose a sentence of probation for two or three years, Mr. Suter may not be able to make this money in two or three years. The government and all of these victims are without recourse if a period of probation is imposed until the last day of that probationary period. That would be the time that Mr. Suter is deemed to have violated his probation.

I think in light of his current assets [8] situation, the home, the stock, and so on, if you were to impose or consider imposing—and again, I have to underscore I am not recommending this. I only wanted to advise the Court of some flexibility that you might have in sentencing Mr. Suter—if you were to consider either a long surrender date for a period of incarceration or advise Mr. Suter of his options of approaching the Court within 120 days on a motion to reduce, Mr. Suter might have more incentive to try to make some prompt restitution out of his

current assets rather than attempting to—as we must at this point spe ulate on Mr. Suter's future earning potential.

THE COURT: What do you have in the way of current assets, Mr. Suter, just in round figures?

DEFENDANT SUTER: Well, cash or near cash?

THE COURT: Something convertible.

DEFENDANT SUTER: Within the next 20—

THE COURT: Within, say, the next 90 days.

DEFENDANT SUTER: That is definitely convertible, maybe $25,000.

THE COURT: You have real estate that you probably couldn't sell within that period of time; is that it?

DEFENDANT SUTER: No, I don't think you can sell real estate within 90 days.

No, I have cash or near cash, securities.

MS. FABRI: He could within 90 days, your Honor,

* * *

[14] THE COURT: —as to all or some of that coin.

MS. FABRI: That is true.

MR. ARNETT: That is precisely why this is headed "Undisputed Claims" because there is that one disputed claim.

MS. FABRI: Mr. Suter's offer to me for settlement with respect to Dr. McCullough was zero, and based on my records, your Honor, I believed it to be at least $13,000 apart and possibly $23,000 apart and could not in good conscience advise you that we had agreed.

I don't even think Dr. McCullough's lawyers would have wanted us to agree that Mr. Suter owed nothing to Dr. McCullough, and that is the reason—

MR. GLICK: In fact, your Honor, two days ago—

THE REPORTER: Could I have your name, please?

MR. GLICK: I am sorry. I am Charles Glick. I work with Ms. Lovelette on this case.

As of two days ago they were offering $13,000, which was our last offer in settlement. They had offered us $10,000 some time ago.

THE COURT: Well, I am not going to intrude into Judge Parsons' domain.

MR. GLICK: I understand that, your Honor.

THE COURT: I am sure he will take good care of you on Monday.

MR. GLICK: Let me point out one thing. The last

* * *

[Docketed January 25, 1984]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Hon.. John F. Grady
No. 82 CR 563

UNITED STATES OF AMERICA, Plaintiff,
vs.
RICHARD W. SUTER, Defendant.

MOTION TO WITHDRAW PLEA OF GUILTY

RICHARD W. SUTER, the defendant in the above entitled case, moves the Court, pursuant to Rule 32(d), F.R.Crim.P., that he be permitted to withdraw his Plea of Guilty, for reasons and upon grounds as follows:

1. On October 21, 1983, the defendant appeared for sentencing, but the sentencing was continued until January 24, 1984.

2. His plea was entered in reliance upon the government's promise that

> "12. At the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose."

Since defendant believed and relied upon that promise, he was surprised when the Assistant United States Attorney advised the Court that—

"MS. FABRI: Your Honor, I believe that the most serious question we have to address today, now that we have some resolution as to the amount [of proposed restitution], is the manner in which Mr. Suter can reasonably be expected to make this restitution.

I don't know if the Court is aware of an order entered by the Securities & Exchange Commission earlier this week. That order, as I understand it, your Honor—and I will just read the last sentence—

MR. ARNETT: This week?

MS. FABRI: Could have been last week. I am not certain, Mr. Arnett. I received a copy of it this week.

> 'Under all the circumstances, we are convinced that the public interest requires the revocation of Suter's investment advisor registration and his bar from association with any investment advisor.'

* * *

. . . So that if this administrative decision does go into force and effect . . . the result of it would be that Mr. Suter cannot publish his newsletter. . . .

Judge, I think a very serious question is presented to the court as to how Mr. Suter can reasonably be expected to make restitution. . . ." (TR 6)

Assistant U. S. Attorney Fabri knew or should have known that she was incorrectly stating the law inasmuch as Mr. Suter has a right to publish his financial newsletter without being a registered investment advisor, both under the exemption of 15 U.S.C. 80b-2(a)(11)(D) and under the First Amendment Freedom of the Press. It appears that she was violating the Plea Agreement not to make any recommendation about sentencing by suggesting to the Court that there allegedly was "a very serious question . . . as to how Mr. Suter can reasonably be expected to make restitution." The inescapable inference is that, since he can't make restitution because he allegedly would be unable to continue publication, according to her, it was

being implicitly recommended that he should be sentenced to incarceration rather than probation.

3. She went on to argue, "I recognize that you are considering a sentence of probation and, of course, pursuant to the plea agreement, *I can make no recommendation*, **but** I submit, your Honor, you have a great deal of flexibility built into the system." (TR 7) Then the Government apparently further violated its promise not to make recommendation for some sentence more severe than probation, by stating, 1984, Orwellian style:

> "I would urge you, Judge, *although I am not* requesting or *recommending a sentence of incarceration*—pursuant to our plea agreement, *I cannot do that*, and I understand that *the Court is inclined to give a sentence of probation* if Mr. Suter were to agree to make restitution; *but, Judge*, if you impose a sentence of probation for two or three years, Mr. Suter may not be able to make this money in two or three years.
> The government and *all of these victims are without recourse if a period of probation is imposed* until the last day of that probationary period. That would be the time that Mr. Suter is deemed to have violated his probation. (emphasis added; TR 7) . . .
> —and again, I have to underscore I am not recommending this." (TR 8)

By such arguments, the Government has, defendant believes, so breached the term of the plea agreement to "make no recommendation to the judge concerning what sentence or fine to impose" that he should, on that ground alone, be permitted to vacate or withdraw his Guilty Plea, inasmuch as this motion is being filed before sentencing.

4. Another ground for allowing withdrawal of the plea is that, after having carefully reconsidered, during this period when he was supposed to be trying to make restitution, he now is convinced that he is not guilty, for

reasons stated in his attached Affidavit. Withdrawal of the plea should therefore be allowed to avoid manifest injustice, as more fully explained in the Memorandum also attached.

WHEREFORE, Defendant prays for the entry of an Order permitting him to withdraw forthwith his guilty plea.

/s/ Gordon J. Arnett
Defendant's attorney

GORDON JAMES ARNETT
Attorney for Defendant
5875 N. Lincoln Ave.
Chicago 60659
334-0400

[Docketed January 25, 1984]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Hon. John F. Grady
No. 82 CR 563

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD W. SUTER, Defendant.

AFFIDAVIT IN SUPPORT OF *MOTION TO WITHDRAW PLEA*

I, RICHARD W. SUTER, being first duly sworn under oath, depose and say as follows:

1. After having carefully considered, during this period when I was supposed to be trying to make restitution of $67,000, I now realize that I am not guilty. I had not carefully reviewed the facts regarding the purchase and sale of silver coins, which was a small part of my business operations compared to the publication of my financial newsletters, until it came time to consider actually making restitution. Then I realized that, in almost every case, I had made substantial delivery of coins to these alleged victims; and the amounts they claimed were due were in fact disputed claims—claims resulting from coins they had refused to accept, or fees which they owed me. I wasn't

aware of these facts at the time I had entered the plea, because it had been almost three years since I had turned over all my records about these matters to my former attorney, James Streicker.

2. As far as I am concerned, every time that I bought one of the uncirculated United States silver coins for a customer's investment purpose, I had been entitled to a Commission, even if those coins were eventually determined to have been overgraded by the person or company from whom I had bought it, inasmuch as it was made clear that I did not carry any inventory of coins myself.

3. Also, I was entitled to collect for the cost of the ANACS certification and grading fees which I paid even for overgraded coins. Further, I was not to be liable for any amounts of money which dealers from whom I had made the purchases would refuse to refund to me for coins which, after grading by ANACS, were determined to have been overgraded by the dealer.

4. Also, the Government should be precluded from claiming that I had committed fraud, because my former attorney, James Streicker, had specifically advised and instructed me *not* to make any more shipments of coins or refunds. This instruction was given me in 1980, and I followed my attorney's advice. In retrospect, I now wish I had gone ahead and made the shipments and refunds, which I had considered doing, and as I had done with many satisfied customers.

FURTHER AFFIANT SAITH NOT.

/s/ Richard W. Suter
RICHARD W. SUTER, Defendant

STATE OF ILLINOIS
County of Cook—ss:

RICHARD W. SUTER, being first duly sworn under oath, deposes and states that he has read and understands the foregoing statements, which are true to his personal knowledge.

/s/ Richard W. Suter
RICHARD W. SUTER, Affiant

Subscribed and sworn to before me
this 18 day of January, 1984.

/s/ [Illegible]
Notary Public

[Dated January 18, 1984]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable John F. Grady

Cause No. 82 CR 563

Title of Cause:
United States vs. Richard W. Suter

Brief Statement of Motion:
to Withdraw Plea of Guilty

* * *

Names and Addresses of moving counsel:
G. J. Arnett, 5875 N. Lincoln, Chicago 60659

Representing:
Defendant

Names and Addresses of other counsel entitled to notice and names of parties they represent:
Candace J. Fabri, AUSA, 219 S. Dearborn, 15th fl., 60604

U.S.A.

Enter motion of deft. to withdraw plea of guilty. Government to respond to the said motion by Friday, January 20, 1984. Sentencing date for Tuesday, January 24, 1984 at 10:00 a.m. to stand.

/s/ Grady, J.

[Dated January 24, 1984]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 82 CR 563-1

United States of America

vs.

Richard W. Suter, Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL—In the presence of the attorney for the government the defendant appeared in person on this date 01-24-84 WITH COUNSEL, GORDON JAMES ARNETT.

PLEA—GUILTY, and the court being satisfied that there is a factual basis for the plea.

FINDING & JUDGMENT—There being a finding of GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully using the United States mails in executing a scheme and artifice to obtain property by means of false and fraudulent representations;

In violation of Title 18, United States Code, Section 1341, as charged in Counts 3 and 15.

SENTENCE OR PROBATION ORDER—The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR on Count 3, on Count 15, the imposition of sentence is suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to run consecutively with the sentence on Count 3.

SPECIAL CONDITIONS OF PROBATION—A special condition of probation is that the defendant use his best efforts to make restitution in the amount of $67,800.00 during the period of probation to the persons and in the amounts specified in the agreed statement concerning restitution which the defendant has heretofore filed. A further condition of probation will be that the defendant not deal in coins.

FURTHER ORDERED that the execution of sentence is stayed pending appeal or until March 6, 1984.

FURTHER ORDERED that on the government's oral motion Counts 1, 2, 4 through 14 and 16 through 23 hereby are dismissed.

* * *

COMMITMENT RECOMMENDATION—3x5

/s/ John F. Grady
U.S. District Judge

Date 01-24-84

[Dated February 3, 1984]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable John F. Grady

Cause No. 82 CR 563-1

Title of Cause:
U.S.A. v. Richard W. Suter

* * *

On motion of deft, Enter Order *nunc pro tunc* to June 24, 1983, deft's. motion to dismiss the indictment is hereby denied.

Enter Order *nunc pro tunc* to January 24, 1984, deft's. motion to withdraw plea of guilty is denied.

/s/ Grady, J.

EXHIBIT 3

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 886 / October 17, 1983
Admin. Proc. File No. 3-6038

In the Matter of
RICHARD W. SUTER
doing business as
NATIONAL INVESTMENT PUBLISHING COMPANY
6545 West Addison Street
Chicago, Illinois
(801-5509)

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDINGS

Grounds for Remedial Action

Scheme to Defraud Newsletter Subscribers

Fraudulent Advertising

Sale of Unregistered Securities

Fraud in the Sale of Securities

Failure to Permit Inspection

Failure to Comply with Recordkeeping Requirements

Where registered investment adviser who published advisory newsletter engaged in a scheme to defraud subscribers through the multiple billing of their accounts, and falsified records and forged signatures in an effort

to cover up that scheme; used fraudulent advertising; unlawfully offered and sold unregistered securities and made fraudulent representations in connection therewith; refused to permit a full inspection of his books and records; and discarded certain records required to be kept, *held*, in the public interest to revoke adviser's registration, and to bar him from association with any investment adviser.

APPEARANCES:

Richard W. Suter, pro se.

Dolores H. Dohm and *Barbara A. Schmidt*, for the Commission's Division of Enforcement.

EXHIBIT 4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 106, 173—August Term, 1983

(Argued September 19, 1983 Decided January 18, 1984)

Docket Nos. 83-6108, 83-6116

Securities and Exchange Commission,

Plaintiff-Appellant-Cross-Appellee,

v.

Christopher L. Lowe et al.,

Defendants-Appellees-Cross-Appellants.

Before OAKES and VAN GRAAFEILAND, *Circuit Judges*, and BRIEANT, *District Judge.**

Investment adviser whose registration under the Investment Advisers Act of 1940 had been revoked for criminal misconduct held not entitled to continue publishing investment advisory newsletters despite First Amendment. Judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Chief Judge*, reversed.

Jacob H. Stillman, Associate General Counsel, Securities and Exchange Commission, Washington, DC (Daniel L. Goelzer, Alan Rosenblat, David Sirignano, W. Robert Gray, of counsel), *for Appellant-Cross-Appellee.*

Michael E. Schoeman, Schoeman, Marsh, Updike & Welt, New York, NY (Elizabeth H. Cooper, David A. Newberg, of counsel), *for Appellee-Cross-Appellant Lowe.*

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* Of the Southern District of New York, sitting by designation.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 6115 Hon. James B. Parsons

R. D. McCULLOUGH, II AND UTICA NATIONAL BANK, AS TRUSTEE OF THE R. D. McCULLOUGH, II SELF-EMPLOYED RETIREMENT PLAN, Plaintiffs,

v.

RICHARD SUTER, d/b/a NATIONAL INVESTMENT PUBLISHING COMPANY, Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO VACATE TRIAL ERRORS

The Defendant, by leave of Court granted, files this Memorandum, stating as follows:

As stated in *Schacht v. Brown*, 711 F.2d 1343, 1354 (7th Cir., 1983):

> Nonetheless, defendants argue, the use of civil RICO suits against business fraud, such as that alleged here, would duplicate existing state law and federal securities law remedies, would not further the purposes of the Act, and was not within the contemplation of Congress.

Although defendant herein agrees with that contention, which was rejected by our Court of Appeals, that is not the issue being raised, apparently as a case of first impression, here. *The issue is*—since the title of the Act states that the subject matter of the Act relates to "Racketeer Influenced" organizations or enterprises, *can the sole-proprietor of a business be the person guilty civilly of racketeer influence upon his own business, especially when he was not so charged in the related criminal case based upon identical facts?*

MINUTE ORDER FORM
(1/85e)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 82 CR 563-1 Date: 3/27/85

Name of Assigned: Judge John F. Grady

Case Title: USA vs. Richard Suter

MOTION: Stay of Service of Sentence pending Petition for Writ of Certiorari

DOCKET ENTRY: (2) [Other docket entry:] Deft. is granted a stay of service of sentence pending Petition for Writ of Certiorari.

(3) Filed motion of [use listing in "MOTION" box above]

Docketing to mail notices

4 + 12cc—number of notices
3-29-85—date typed envelopes
3-29-85—date mld notices

[Received September 20, 1984]

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1198 vs.

RICHARD W. SUTER,

Defendant-Appellant.

MOTION TO CONSOLIDATE THIS APPEAL WITH TWO OTHER PENDING APPEALS INVOLVING THE SAME DEFENDANT-APPELLANT AND BEING RELIED UPON BY THE GOVERNMENT IN ITS BRIEF IN THIS APPEAL

Now comes the Defendant-appellant, Richard W. Suter, by his attorney, Gordon James Arnett, stating as follows:

1. The idea of presenting this motion was the direct result of pending preparation of Appellant's Reply Brief. In the Government's List Of Authorities and the text of its Appellee's Brief, it lists and comments and relies upon—

"McCullough v. Suter, No. 82 C 6115 (N.D.Ill.) *appeal pending*, No. 84-1516 (7th Cir.) 14

"SEC v. Suter, 732 F.2d 1294 (7th Cir. 1984) . 11

"Suter v. SEC, No. 83-3011 (7th Cir. filed Nov. 16, 1983) ..... 11."

On page 11 of appellee's brief is stated, inter alia,

> "The written plea agreement provided that 'at the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose' (A35), but the government would 'fully apprise the district court . . . of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters. . . . ' . . . .
> After the guilty plea was accepted, the district judge inquired about possible restitution to the defendant's victims. . . .
>
> . . . The prosecutor then advised the court that defendant's registration with the Securities and Exchange Commission (SEC) as an investment advisor had just been revoked, which cast doubt on defendant's future earnings and, thus, his ability to make full restitution."

On page 14 of the government's brief is stated,

> "Turning away from defendant's obligation to show a fair and just reason and the additional question of prejudice to the government, the district judge believed the consequential effect of the guilty plea on civil litigation pending against the defendant 'does appear to be something which motivates his present motion to withdraw this plea.' 1-24-84 Tr. 4. The district court's view is borne out by a pleading defendant filed in certain civil litigation, *McCullough v. Suter*, No. 82 C 6115 (N.D.Ill.), now before this Court on defendant's appeal, docket No. 84-1516. . . ."

2. Appellant will include these quotations within his Reply Brief now being prepared, and will also include them in motions being filed in the above-named appeals. The place to give appellant's arguments based upon these quotations from the government's brief is, however, in said Reply Brief, not in this motion. Suffice it to conclude

here that it is the Department of Justice, Appellee, which has made these inescapably intertwined connections between this criminal case and at least three of the related cases. No one of those cases can be adequately argued or briefed alone; both for efficiency and in the interest of justice, they need to be consolidated, now that the government has shown their close relationships, factually and legally.

3. Without such consolidation, appellant may well be deprived of his Due Process and Equal Protection rights by thereby being unable to prove the Selective Prosecution of himself and his publishing company through this series of related cases.

WHEREFORE Appellant prays for an Order consolidating this appeal with appeals No. 83-3011 and 84-1516; and such other relief as the consolidation may require.

_____

Appellant's attorney

GORDON JAMES ARNETT
Attorney for Defendant-appellant
5875 N. Lincoln Ave.
Chicago 60659
334-0400

CERTIFICATE OF SERVICE

I, G. J. Arnett, the attorney, certify that I served the above Motion to Consolidate by delivering a copy to Assistant U. S. Attorney, Daniel C. Murray, by personal delivery to the receptionist at the U. S. Attorney's office on the 15th floor of the Dirksen Federal Building on September 21, 1984.

_____

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 27, 1984

By the Court:

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1198 vs.

RICHARD W. SUTER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 563—John F. Grady, *Judge*.

On consideration of the "MOTION TO CONSOLIDATE THIS APPEAL WITH TWO OTHER PENDING APPEALS INVOLVING THE SAME DEFENDANT-APPELLANT AND BEING RELIED UPON BY THE GOVERNMENT IN ITS BRIEF IN THIS APPEAL" filed herein on September 20, 1984, by counsel for the defendant-appellant,

IT IS ORDERED that said motion is hereby DENIED.